U.S. Coast Guard
Media Relations in High-Visibility Court Martial Cases

A practical guide

Provided by the Coast Guard Headquarters
Office of Public Affairs and the
Office of Military Justice
May 1999

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Introduction

National interest in a number of recent courts-martial cases demonstrated the importance of Coast Guard Legal and Public Affairs personnel working together to respond to media about the military justice system and prevent communication of inaccuracies. This guide provides practical advice to PA personnel concerning media relations in highly visible courts-martial cases. The key to success is advance preparation for media interest and working with legal personnel to get the Coast Guard story out in an accurate, timely, and ethical fashion, without jeopardizing an accused's right to a fair trial. Your efforts to assure proper public affairs counsel during military justice proceedings will benefit all parties involved.

The purpose of this guide is to provide assistance to Coast Guard public affairs offices preparing to provide support in high-profile military courts-martial proceedings. It is adopted from those produced by the Air Force and Army. Military District of Washington and Department of Defense (DoD) materials have been referenced as well. The Military Justice Fact Sheets are provided as samples to consider in preparing your own PA plans and products. These are examples of what can work during legal proceedings. However, under those circumstances, you should coordinate each of your releases with the assigned legal spokesperson.

U. S. Coast Guard Office of Public Affairs
April 1999

Chapter 1

Overview on releasable information

Don't forget the Victim's Rights and Restitution; Freedom of Information and Privacy Acts

Know what information you can and cannot release in a particular case. The Coast Guard Freedom of Information and Privacy Acts Manual, COMDTINST M5260.3, provides guidance on release of information to the public. As far as practicable, the American Bar Association Model Rules of Professional Conduct and Code of Judicial Conduct, which contain rules regarding publicity and the responsibilities of the judge and prosecutor, apply to courts-martial in the Coast Guard. See the Military Justice Manual, COMDTINST M5810.1C, Article G-A. Additionally, the Coast Guard has a statutory requirement to protect the privacy of crime victims under the Victim and Witness Protection Act of 1982 (Public Law 97-291). See also Article 2-R of the Military Justice Manual, COMDTINST M5810.1C and the ABA Model Rules of Professional Conduct, Rules 3.6, 3.8, and 4.4.

Don't forget that release of information about witnesses and the accused is restricted by the Privacy Act. Consulting early with your servicing legal office will prevent the inadvertent release of information protected under the Privacy Act.

News releases of other information to members of the media relating to any case or matter that may be prosecuted at a trial by court-martial must be approved by the command legal officer.

The actual release of information to the media is a command responsibility, usually delegated to the Public Affairs Officer. The Legal Officer must provide informed advice to the commander concerning the release of information. Applicable laws, directives, security requirements, regulations, and orders of a military judge or other court all affect the release of information. Counsel must ensure that investigators, law enforcement personnel, employees, and other persons assisting or associated with counsel do not make extrajudicial statements which counsel themselves are prohibited from making. Furthermore, no staff agency may release information to the media without advance approval of the legal counsel, who will utilize the PA office as the releasing agency. In cases where substantial media interest occurs, the legal officer should request assignment of a legal spokesperson as discussed in Annex B to work with the PA office.

In appropriate situations, PAOs should warn other Federal employees that 5 CFR 2635.703, a punitive regulation, prohibits Federal employees (including military personnel) from improperly using nonpublic information, allowing another to use nonpublic information, or making a knowing unauthorized disclosure. Title 18 USC sections 793, 794, and 1905, make it a Federal offense for employees to disclose trade secrets, confidential business information, classified information or any information not available to the public the release of which would damage U.S. interests. Similarly, Title 41 USC section 423, protects sensitive procurement information from unauthorized disclosure. Disclosing information from a closed proceeding or relating to sealed documents, for example, can have serious adverse consequences. The Legal Officer or spokesperson can advise the PAO on what information is authorized for disclosure.

Chapter

2

The Path to Success *The Counsel and the PAO work together to provide advice to the commander.*

The basic role of the PAO during a trial is to be up front and aggressively support media imperatives, but do nothing that will jeopardize either the Government's case or the accused's rights to a fair trial. Media expect the PAO to provide releasable information about the trial. The PAO must remain objective during a trial. Coordinate carefully with legal counsel to determine the preferred PA strategies and tactics that would provide news media support and also assure an unbiased environment for the legal proceedings.

Your supporting legal counsel can provide advice as to the kinds of information relating to a criminal proceeding that have a substantial likelihood of prejudicing the criminal proceeding.

If you have information that does not prejudice a criminal proceeding, and it is releasable under the Freedom of Information Act or the Privacy Act, you may release the information as required. The Freedom of Information Act requires release of information that is not otherwise exempt from release. Information will be exempt from release, for example, when the information is protected by the Privacy Act, the policy of protecting the privacy of victims and witnesses.

Information that may be released can be provided in the form of "extrajudicial" statements, or in the form of documents or records. Extrajudicial statements must comply with the laws about release of information. Because release of extrajudicial statements is a command responsibility, it is extremely important that the counsel and the PAO work together to provide advice to the commander.

VALUABLE INFORMATION

"Extrajudicial" statements are oral or written statements made outside of a criminal proceeding, (such as those made in a media interview or news release), that a reasonable person would expect to be disseminated by means of public communication.

1. Statements which generally *should not be made.*

Statements relating to the following matters ordinarily have a substantial likelihood of prejudicing a criminal proceeding and generally ***should not be made public:***

- The existence or contents of any confession, admission or statement by the accused or the accused's refusal or failure to make a statement;
- Observations about the accused's character and reputation;
- Opinions regarding the accused's guilt or innocence;
- Opinions regarding the merits of the case or the merits of the evidence;
- References to the performance of any examinations, tests or investigative procedures (e.g., fingerprints, polygraph examinations and ballistics or laboratory tests) or the accused's failure to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
- Statements concerning the identity, expected testimony, disciplinary or criminal records, or credibility of prospective witnesses;
- The possibility of a guilty plea or other disposition of the case other than procedural information concerning such processes;
- Statements, admissions, confessions, or alibis attributable to a defendant, or the refusal or failure of the accused to make a statement.
- Before sentencing, facts regarding the accused's disciplinary or criminal record, including nonjudicial punishment, prior court-martial convictions, and other arrests, indictments, convictions, or charges. Do not release information about nonjudicial punishment or administrative actions even after sentencing unless admitted into evidence. (This rule does not prohibit, however, a statement that the accused has no prior criminal or disciplinary record.); and
- Information trial counsel knows or has reason to know would be inadmissible as evidence in a trial.
- Statements otherwise prohibited may be made in response to prejudicial public statements by other parties, in order to avoid prejudice to the Government or the accused. Such statements must be limited and carefully designed to lessen the resulting undue, adverse impact of the prejudicial statements of others upon the court-martial.

2. Statements that can be released under some circumstances regardless of the stage of the proceedings.

Permissible circumstances supporting release of information include:

There may be valid reasons for making certain information available to the public in the form of "extrajudicial" statements. However, statements must not be used for the purpose of influencing the course of a criminal proceeding. Statements, usually, should include only factual matters and should not offer subjective observations or opinions. Statements which do not have a substantial likelihood of prejudicing a criminal proceeding and are not exempt from release under the Freedom of Information Act or the Privacy Act, and which protect the privacy of victims of crime and prospective witness may be released.

- General information to educate or inform the public concerning military law and the military justice system;
- If the accused is a fugitive, information necessary to aid in apprehending the accused or to warn the public of possible dangers;
- Requests for assistance in obtaining evidence and information necessary to obtaining evidence;
- Facts and circumstances immediately surrounding an accused's apprehension, including the time and place of apprehension;
- The identities of investigating and apprehending agencies and the length of the investigation, only if release of this information will not impede an ongoing or future investigation and the release is coordinated with the affected agencies;
- Information contained in a public record, without further comment.

3. Statements that generally can be made only after preferral of charges.

After preferral of charges the following information may be released:

Release of information should not be used for the purpose of influencing the course of a criminal proceeding, and should ordinarily include only factual matters. Statements usually should not offer subjective observations or opinions. The following information ordinarily does not have a substantial likelihood of prejudicing a criminal proceeding and is not exempt from release under the Freedom of Information Act or protected under either the Privacy Act and are presumed not to be prejudicial to the accused's right to a fair trial.

- The accused's name, unit and assignment;
- The substance or text of charges and specifications, provided there is included a statement explaining that the charge is merely an accusation and that the accused is presumed innocent until and unless proven guilty. Ensure the names of victims and witnesses, as well as social security numbers and Privacy Act protected data are deleted from the charges and specifications. Always be sensitive regarding the requirement to protect the rights and privacy of victims and witnesses;
- The scheduling or result of any stage in the judicial process, but in cases of trials with members, do not release information regarding evidence or rulings not in the presence of the court members;
- Date and place of trial and other proceedings, or anticipated dates if known; the identity and qualifications of appointed counsel;
- Identities of convening and reviewing authorities;
- Any news release will include a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty;
- A statement, without comment, that the accused has no prior criminal or disciplinary record or with the consent of the defense, the accused denies the charges; and
- Generally, however, seek to avoid release of the name or identity of any victim and/or victims of sex offenses, when the release would be contrary to the desire of the victim or harmful to the victim.
- The identities of court members and the military judge. Do not volunteer the identities of the court members or the military judge in material prepared for publication. This information may be released, if requested, after the court members or the military judge have been identified in the court-martial proceeding.

VALUABLE INFORMATION

The release and identity of children who are victims is ***legally prohibited at all times***.

4. Inaccurate and unfair or biased reporting.

If inaccurate, unfair or biased reporting is produced or published in the media about military justice procedures, it needs to be addressed by the PAO and perhaps a subject matter expert, with the reporter or editor.

Additionally, the PAO and the legal spokesperson (if assigned) must ensure that any information or interviews do not include speculation about the facts of the case as this can quickly become construed as unlawful command influence.

PAOs and other government officials must be ever diligent in avoiding even the appearance of injecting unlawful command influence into the case. In its usual usage, "command influence" refers to a commander's unlawful attempt to influence the proceedings of a court-martial via counsel, judge, court-members or witnesses.

In this context, "command influence" normally results from harmful but well-intentioned or inadvertent statements, which inappropriately influence a particular proceeding. As indicated previously, statements otherwise prohibited may be made in response to prejudicial, extrajudicial public statements by other parties, in order to avoid prejudice to the Government or the accused. Again such statements to correct the record must be limited and carefully designed to lessen the resulting undue, adverse impact of the prejudicial statements of others upon the court-martial. The Government must avoid engagement in a mud-slinging contest. The temporary advantages of such actions will be outweighed in the long term by the Government's loss of public esteem.

VALUABLE INFORMATION

Do not speculate about the facts of the case.

Frequently, documents already admitted into evidence at trial will provide the best available facts and arguments for both sides.

Frequently, documents already admitted into evidence at trial will provide the best available facts and arguments for both sides. Once these documents have been lawfully released to the press, they may be explained and commented upon by attorneys familiar with the military justice system who are not associated with the proceeding. The names of civilian experts in the area of military justice, who are not acting as agents for the command or Coast Guard, may be provided upon request to the press. They can lawfully explain prosecution and defense tactics without raising the specter of unlawful command influence or of other government attempts to harm the right of the accused to a fair trial. For experts in military justice who could assist in this capacity, contact:

Judge Advocates's Association, 6800 Chapins Road, Bloomsburg, PA 17815-8751, (570) 752-2097 or (877) 696-0677, Fax (570) 752-2097 or ABA Standing Committee on Armed Forces Law, 750 North Lake Shore Drive, Chicago, IL 60611, (312) 988-5604, Fax (312) 988-5628

5. Release of court-martial record of trial.

A "transcript of oral proceedings" is not a record until authentication.

A court-martial record of trial is subject to release determination under the Privacy Act and Freedom of Information Act. Information marked as classified, controlled, or sealed by judicial order should not be released absent an authoritative determination of releasability. A "transcript of oral proceedings" is not a record until authentication. When releasing records of trial under this paragraph, redact all Privacy Act protected data, to include the names of victims of sex offenses, the names of children, and the identity of victims who could be harmed by disclosure of their identity.

6. Release of other military justice documents or records.

... due regard will be given to the potentially heightened privacy interests of all accused where a case has not been fully adjudicated

All other documents or records, including documents which will, but have not yet become part of a "record of trial," and including those which are attached to the court-martial record of trial but not made a part of the record of trial under the provisions of RCM 1103 (for example, an Article 32 report and its attachments) are also subject to release determination under the Privacy and Freedom of Information Acts. However, due regard will be given to the potentially heightened privacy interests of all accused where a case has not been fully adjudicated as well as to whether any exemption, such as those included to protect ongoing deliberative processes or investigative processes should be invoked. Information marked as classified, controlled, or sealed by judicial order should not be released absent an authoritative determination of releasability. When releasing military justice documents or records under this paragraph, redact all Privacy Act protected data, to include the names of victims of sex offenses, the names of children, and the identity of victims who could be harmed by disclosure of their identity.

7. Release of information under FOIA.

The Freedom of Information Act (FOIA), gives the media an alternative to going through PA to obtain information. FOIA channels are not as rapid as Public Affairs service to the media; frequently they are not as responsive to actual media needs; media get only what they ask for with no helpful explanation. For that reason, PAOs should work with the unit FOIA office to identify media requests and determine whether Public Affairs provides better media service. In addition to faster service, the PAO can find out exactly what the media are trying to locate, and can try to provide it in an understandable form. Occasionally, documents requested by media under FOIA procedures do not provide the facts or explanations the media really need. The PAO can be of genuine service to all by acting as go-between.

Note: The above does not mean that otherwise nonreleasable information can or should always be released by PAOs. If the requested documents are releasable under the Acts highlighted above, provide them to the media through Public Affairs channels if it better serves media interests. Don't make the media go through FOIA procedures to get them. Furthermore, make the documents available to the media free of charge unless they involve excessive costs to the government.

8. Release of other military justice audiovisual documents or records

Rule for Courts-Martial (RCM) 806(c) prohibits video and audio recording and the taking of photographs

Except for the purpose of preparing the record of trial – in the courtroom during the proceedings. Radio and television broadcasting of proceedings from the courtroom are also prohibited. (However, the military judge may, as a matter of discretion, permit contemporaneous closed-circuit video or audio transmission to permit viewing or hearing by an accused removed under RCM 804 or by spectators when courtroom facilities are inadequate to accommodate a reasonable number of spectators). PAOs should work closely with their legal counsel to determine the level of media interest early on in order for the military judge to make an informed decision about audio-video accommodations.

Coast Guard representatives must not encourage or assist news media in photographing or televising an accused being held or transported in custody, nor should photographs of the accused be provided to the media.

9. Words to “avoid” (don’t use).

Familiarize all PA support personnel as well as any legal subject matter experts with language that they should "avoid" when talking to the media:

No sensationalism or exaggeration;
No slang, unless in a direct quote;
Do not use the term "criminal" (in reference to the accused);

Do not use editorial words prejudicial to the accused before trial, such as hit-and-run driver, deserter, or murderer. Before conviction, use "the accused is charged with the crime," or "alleged to have committed."

Chapter

3

Public Affairs Media Plans

1. Four Key Points

Develop a PA plan for dealing with the media

Tailored to the needs of your high visibility cases. Develop the plan in coordination with your legal counsel.

VALUABLE INFORMATION

Develop a PA plan

Agree upon command levels for release authorizations

Coordinate between PAOs

Obtain relevant command decisions regarding releases.

Obtain a clear understanding among superior and subordinate command levels as to what command level will be the release authority and coordinate with the PAO from that command. Include this information in your PA plan.

PAO "Jurisdiction". Coordination and roles should be thoroughly discussed and determined between the unit, district, area or headquarters PAOs, as well as how coordination is done with the installation staff. Include this information in your PA plan.

Obtain the relevant command decisions regarding which commanders must personally approve releases.

2. Media Plan Contents

Just as operations plans are developed with the active input of those experts who must employ it, your PA plan for these events must be developed with your supporting legal officers involvement. Request input from your legal office to help develop the plan, review it, and provide the substantive legal information needed to formalize it. The commander

should approve it. Annex B is an example plan which may be adapted for use for specific cases. The plan should generally address the following:

1. **Background.** Describe circumstances and general information pertaining to the mission.
2. **Purpose and mission of PA support.** Define purpose of PA plan and the PA mission you are expected to accomplish for high visibility litigation proceedings.
3. **Strategy to accomplish PA support.** Define the general public affairs intent and approach to publicity and the means by which you intend to accomplish it. (Example: Provide timely release of information to the news media at each phase of the legal proceedings, and/or, Keep service members informed at each phase of the legal proceedings through timely command information coverage).
4. **Goals of PA support.** Think about what outcomes you would like the PA coverage to help accomplish. (Example: Accommodate news media interest without adversely impacting on the trial.)
5. **Key messages or themes.** Identify information that is central to the commander's intent to be reinforced throughout the proceedings in public releases. An example could be the commander's intent to protect the privacy of victims and/or to ensure a just trial.
6. **Audiences.** While media are often considered to be an audience, they are in fact the medium through which the audience is reached. Audiences can be internal or external and cover the spectrum from the general public, soldiers, other services and Congress, all the way to special interest groups. Identification of the interested audiences will assist PAO's in targeting the appropriate media channels.

VALUABLE INFORMATION

Media are the conduit through which the audience is reached.

7. **Tactics.** Tactics include the details of how you will accomplish your strategy; through which publications or media channels. Be sure to remember your own Command Information channels.
8. **Coordination and responsibilities.**

- Obtain a clear understanding among superior and subordinate command levels as to what command level will be the release authority and coordinate with the PAO from that command.
- PAO "Jurisdiction", coordination, and roles should be determined and addressed between the unit, district, area and headquarters PAOs, as well as how coordination is done with the staff of the relevant command.

- If your plan contains logistical requirements for military police, other staff, personnel for additional duties, equipment, facilities and other support, you may also need to request that your command issue an operations order to ensure the appropriate level of priority and support from all staff agencies involved.

9. Written Q's and A's (questions and answers) prepared for PA use in responding to standard and expected questions. The Fact Sheets contained in Appendix A may be used for more general questions about the military Justice system.

10. Concept of media operation to include

- Establishment of a media center. Plan for adequate phone lines and basic amenities such as coffee, water, etc. Identify a location convenient to the courtroom but also in an area that will not unduly interfere with trial proceedings or, more importantly, deliberations.
- As news reporters arrive at media center (consider having a PA rep to direct media to the media center), provide handouts, brief them on rules, location of restrooms, etc. Provide lots of space/phones/outlets to file stories, plug in laptop computers, etc. Don't forget cameramen camped outside.
- Escorting the media. Provide the media with badges so they can be distinguished from other civilians in the area. Clearly identify “off-limits” areas and provide escorts as needed.
- "Ground rules" for press members (e.g., where they are allowed to go on post, where photography is permitted or prohibited, “off-limits” areas, procedures for requesting interviews, including locations of "man on the street" interviews, whether they will be allowed back into the courtroom after the day's proceedings in order to do a "standup," etc.). Be sure everyone understands your ground rules in advance.
- Legal Spokesperson. An independent legal officer, specially trained as a subject matter expert, to provide information on the military justice process. Obtain a legal counsel not associated with the prosecution of the case will be assigned to provide information regarding the military justice system, such as rules of evidence, court-member voting procedures, etc. A counsel assigned to perform this function should not be provided inside information from the prosecution and should be limited to the information revealed in open court. Four such legal spokespersons, two stationed on each Coast, will be designated and trained as subject matter experts. Contact G-LMJ, MLCA(l), MLCP(l), or CCGD13 (d1) to request the assignment of a legal spokesperson to the case from a command outside of the Staff Judge Advocate’s office.

- Press kits. Distribute a press information kit to credentialed media covering the trial and/or attending the pre-trial background briefing. Include the items that are of importance to the media, and have more general information available for them to pick up. Among items you may wish to include in such a kit may be: "Ground rules" for press members; Copy of the charges, sanitized as appropriate (no SSNs, for example); Extracts of the UCMJ and MCM as appropriate; List of names of trial participants (not including witnesses, judge or members as discussed above); Information on how to contact PA after duty hours.

11. **Evaluation.** Once trial begins, continued evaluation by both PA and legal counsel is critical. Periodic procedural updates through the use of "background" interviews can be effective in keeping the media informed about the progress of the trial. No PA plan is complete without addressing the evaluation of how well the PA goals are being met and appropriate adjustments to the plan as necessary.

VALUABLE INFORMATION

A PA plan is not complete without an evaluation of how well the PA goals are being met.

Chapter

4

Other media considerations

1. Media in the courtroom

Work with your supporting counsel to reserve a reasonable number of courtroom seats for the media and at least one PA escort. If the number of reporters wishing to cover the trial exceeds the number of seats that can reasonably be allocated, consider pool coverage. In extraordinary situations, it may also be appropriate to ask the judge to allow contemporaneous closed-circuit video or audio transmission to permit viewing or hearing by spectators in a separate room when courtroom facilities are inadequate to accommodate a reasonable number of spectators.

2. Preparing your spokesperson

Prepare credible Coast Guard spokespersons to deal with the media. While PA is responsible for organizing and assuring execution of the plan, commanders and counsels are most likely to be called upon to be spokespersons on military procedures, justice and command issues. People who actually work with the military justice system on a daily basis frequently have more inherent credibility than someone who has had a "crash course" in the basics of military justice. Legal staff should be used as spokespersons to explain the Uniform Code of Military Justice issues surrounding the case. Unless requested, they are, ordinarily, not to be considered spokesmen on command issues more appropriately addressed by those who have responsibility of command. Media training for the spokespeople is essential.

3. Pre-trial background briefing

Have a legal spokesperson who is a subject matter expert available throughout the course of high profile legal cases, both Article 32 proceedings and court-martials. That legal officer should be made available to explain technical UCMJ issues to reporters.

Based on circumstances and your counsel's analysis of the need to conduct one, a pre-trial background briefing, with written handouts, for the media can be conducted – moderated by PA but conducted by the counsel – on military justice procedures. Such a briefing should focus on the process, and steer away from substantive issues in the case, especially evidentiary issues related to guilt or innocence. The briefing can also include the kinds of releasable information discussed earlier in this document. It should also educate the media about how the UCMJ compares to the civilian system.

4. Tips for subject matter experts to a successful interview with the media

Know your key messages and take every opportunity to communicate them.

- Have a positive attitude.
- Know your subject.
- Know the limitations on information that may be released. Seek the help of your PAO on the types of interviews, the consequences of the types, and other limitations.
- Be familiar with the media and their needs (deadlines, etc.).
- Be candid and honest.
- Use concise, simple talking points on the subject, while keeping in mind:
- You are "the Coast Guard" when doing an interview. Do not offer personal observations or opinions.
- Take the attitude the reporter represents the public and the public has the right to know.
- Do not use technical jargon or military acronyms. Talk the public's language.
- Put your conclusions first; then expand.
- Use short quotes; long answers are seldom used.
- When you have made your point, stop!
- Do not say anything outside the interview you would not want to see in newsprint or hear broadcast the next day.
- Keep cool under fire.
- Know the up-to-the-minute breaking developments in the case.
- Do not accept a reporter's facts or figures, or answer hypothetical questions.
- If you do not know the answer, admit it; but offer to find out.
- Remember; you are the expert on the particular subject.
- Don't try to impress the reporter.
- Arrive early; talk to the reporter; offer subjects, points you want to discuss.
- Do not use "no comment" – you will sound and look guilty. Tell why you cannot answer.
- Know why you were asked for the interview.
- Establish ground rules and subjects to be covered.

- Be prepared. Even in your specialty, a brush-up is wise.
- When preparing, play devil's advocate. Justify your position. Anticipate questions and draft and coordinate proposed answers.
- The reporter is probably as prepared as you, and just as professional.

5. Lessons learned from experience

- Make sure your courtroom arrangement is conducive to spectators. (In one recent case, the judge's bench blocked the media's view of the witness stand.)
- Coordinate with your assigned legal spokesperson to ensure they appreciate that the media (and PA in turn) often have very short suspenses. Try to anticipate media queries and coordinate responses to media queries in advance. Ensure your supporting counsel understands that "Qs and As" (Questions and Answers) for PA's use are not handouts for the media. They are instead a general reply/position, not necessarily a verbatim response.
- Be prepared for "help" and requirements for coordination from higher headquarters, on both PA and legal counsel sides of the house. Save yourself time in the long run by making sure higher headquarters have received the appropriate special interest reports; providing sufficient details early may prevent higher headquarters from having to bother you with short-notice, short-suspense taskers for more information in order to answer Congressional, Secretariat or Coast Guard Staff inquiries. This is all the more true in cases with extensive national media coverage. Be sure your information is as accurate and complete as time allows.
- Be prepared to defend your decision to provide command information stories about courts-martial. One school of thought is that service members who are interested can get their information from civilian media outlets. On the other hand, personnel often view them as examples of their commander's sincerity to keep them informed. For that reason, commanders often expect to see command information stories about courts-martial printed. Regardless, stories about courts-martial provide PAO's the opportunity to present the information accurately, timely and without bias or sensationalism.
- One final point. Intense media interest in the military justice system is not likely to end. Seek G-IP and G-LMJ assistance if you need it.

U.S. Coast Guard

Media Relations in High-Visibility

Court Martial Cases

A practical guide

MILITARY JUSTICE FACT SHEETS

Table of Contents

THE MILITARY JUSTICE SYSTEM

(The Uniform Code of Military Justice and Manual for Courts-Martial)

Brief History. The historical foundation for our military law and our criminal justice system is the 1774 British Articles of War. In fact, our first codes, the American Articles of War and Articles for the Government of the Navy, predated the Constitution and the Declaration of Independence. Through the First World War, the codes and the system went through some amendments and revisions but were substantially unchanged for more than 100 years.

Throughout most of this time period, we had a very small standing army. Those who entered the military understood that they were going to fall under a different system of justice with unique and different procedures and punishments.

A large number of citizen-soldiers served in the military during World War I. Even though some people had bad experiences at the hands of the military justice system as it existed at that time, there was not an overwhelming demand to make big changes because it was the "war to end all wars." World War I was viewed as an aberration and the United States quickly reverted to a small standing army after the war ended. In World War II, however, the United States had over sixteen million men and women serving in the armed forces. Incredibly, there were about two million courts-martial during those war years. There were more than sixty general courts-martial convictions for every day that the war was fought: a total of about eighty thousand felony court convictions during the war. The soldiers and sailors of World War II, like those of World War I, were regular citizens who volunteered or were drafted. Many of these citizens also had some very unpleasant experiences with the military justice system. At that time, the military justice system look quite different than it does today and did not offer accused the protections afforded by the civilian courts system. It was a system that was foreign to many American citizens and they disapproved of the way criminal law was being applied in the military. Following the war, many organizations studied and made proposals to improve the military criminal legal system, to include: the American Bar Association, the American Legion, the Judge Advocate Association, and the New York Bar Association. Congressional hearings on the military justice system were also started.

After unification of the armed services under the Department of Defense in 1947, Secretary Forrestal, the first Secretary of Defense, decided that there should not be separate criminal law rules for the different branches of service. He desired a uniform code that would apply to all services. His efforts set the stage for a new uniform system of discipline.

Role of Congress and The President. The foundation of military law is the Constitution of the United States. The Constitution provides that Congress has responsibilities to make rules to regulate the military; it also establishes the President as Commander in Chief of the armed forces.

Congress exercised its responsibilities over military justice by enacting the Uniform Code of Military Justice - the "UCMJ." The UCMJ is legislation that is contained in Title 10 of the United States Code, Sections 801 through 946. It is the military's criminal code. It was enacted in 1950 as a major revision of then-existing military criminal law, and became effective the

following year. The structure of the 1950 UCMJ and the 1951 MCM provided substantial guarantees of an open and fair process that continue to exist today. The UCMJ has been amended on a number of occasions since then, with significant changes occurring in 1968 and 1983. Some of the primary changes enhanced the role of trial judges. The need for qualified military judges, who were experienced attorneys, to be in charge of the judicial process and all courts-martial was made clear. Also, the requirement to have a licensed attorney as defense counsel in courts-martial was established. In 1984, there was another substantial revision to the MCM and the military rules of evidence became substantially the same as the Federal Rules of Evidence used in our Federal court system. The procedural requirements were also changed into Rules for Courts-Martial.

The UCMJ is essentially a complete set of criminal laws. It includes many crimes punished under civilian law (e.g., murder, rape, drug use, larceny, drunk driving, etc.), but it also punishes other conduct that affects good order and discipline in the military. Those unique military crimes include, for example, such offenses as desertion, absence without leave, disrespect towards superiors, failure to obey orders, dereliction of duty, wrongful disposition of military property, drunk on duty, malingering, and conduct unbecoming an officer. The UCMJ also includes provisions punishing misbehavior before the enemy, improper use of countersign, misbehavior of a sentinel, misconduct as a prisoner, aiding the enemy, spying, and espionage.

The UCMJ is implemented through Executive Orders of the President of the United States pursuant to his authority under Article 36, UCMJ (10 USC § 836). Those Executive Orders form a comprehensive volume of law known as the Manual for Courts-Martial ("MCM"). The Preamble to the MCM explains that:

> "*The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States*."

Commanders are given significant roles in the military justice system because discipline is essential to mission readiness. At the same time, there are extensive safeguards to protect against abuse of authority. In the opinion of many legal scholars, the UCMJ has not only kept pace with innovations in civilian criminal jurisprudence, but has actually led the way, establishing more safeguards to protect the rights of those accused of criminal offenses. The UCMJ and MCM are primarily kept current with the basic principles of American jurisprudence through two standing committees, The Code Committee and the Joint Service Committee on Military Justice.

The Code Committee. Article 146 of the UCMJ, (Section 946, Title 10, United States Code), establishes a "Code Committee" that meets at least annually to prepare an annual comprehensive survey of the operation of the UCMJ. This committee consists of the judges of the United States Court of Appeals for the Armed Forces; The Judge Advocates General of the Army, Navy, and Air Force, the Chief Counsel of the Coast Guard, and the Staff Judge Advocate to the Commandant of the Marine Corps. Two members of the public appointed by the Secretary of Defense are also members of the committee. A report is then submitted to the Committees on Armed Services of the Senate and the House of Representatives. This report includes

information on the number and status of pending cases, as well as any recommendations relating to uniform policies regarding sentencing; amendments to the UCMJ; and any other matter the committee considers appropriate.

The Joint Service Committee on Military Justice. The Joint Service Committee on Military Justice ("JSC") was established on 17 August 1972 by the Judge Advocates General and the General Counsel of the Department of Transportation. The primary function of the JSC is:

> "To prepare and evaluate such proposed amendments and changes as may from time to time appear necessary or desirable in the interest of keeping the Uniform Code of Military Justice (UCMJ) and Manual for Courts-Martial (MCM) current with the decisions of the U.S. Supreme Court, the U.S. Court of Appeals for the Armed Forces, and established principles of law and judicial administration applicable to military justice, as well as with the changing needs of the military services."

The JSC also performs a second function as an advisory body to the Code Committee established under Article 146, UCMJ. The JSC chairman briefs the Code Committee on the status of JSC actions when the Code Committee meets, and the Code Committee has, in the past, asked the JSC to study specific issues.

Department of Defense (DoD) Directive 5500.17 also states that it is DoD policy to review the MCM annually to assist the President in fulfilling his duties under the UCMJ. Under the direction of the General Counsel of the Department of Defense (DoD/GC), the JSC as the body to accomplish the annual review. The JSC consists of a Voting Group and a Working Group; with each service (including the Coast Guard) having a representative on each group. The JSC Voting Group members are the chiefs of their respective Service's criminal law or military justice divisions. In addition, the United States Court of Appeals for the Armed Forces and the DoD/GC are invited to provide a staff member to serve in a non-voting capacity with the JSC. The JSC chairmanship rotates biennially among the services.

Throughout the year, the JSC reviews proposals for changes to the MCM. Any interested person may submit changes to the UCMJ and MCM to the JSC. The JSC recommends changes to the MCM along with accompanying Discussion and Analysis. The proposed changes are prepared in an annual review, and forwarded to DoD/GC in May of each year. Once the review has been completed, the chairman of the JSC ensures that notice of the proposed changes is published in the Federal Register. This notice begins a 75-day public comment period in which a public meeting is also scheduled. At the public meeting, the JSC listens to comments and proposals from members of the general public. After the public meeting and comment period, the JSC reviews the recommended proposals and the comments. Modifications may be made to a proposal or the proposal may even be eliminated. The review is then prepared as a draft Executive Order (EO) for further executive coordination and implementation by the President.

MILITARY JURISDICTION

Military Status Is the Key. Article 2 of the Uniform Code of Military Justice, (Section 802 of Title 10, United States Code), UCMJ, lists twelve categories of individuals that are subject to trial by court-martial. The categories of persons are: military personnel, whether active, reserve, or retired; members of certain quasi-military organizations (e.g., Public Health Service members when serving with the armed forces); military prisoners; prisoners of war; and under very limited circumstances, certain specified categories of civilians. (The U.S. Supreme Court, however, has prohibited the court-martial of any civilians accompanying the armed forces in the field during peacetime. In addition, certain punitive articles of the UCMJ, by their express terms, may only be used to punish members of the armed forces.)

Court-martial jurisdiction is most commonly exercised over active duty personnel. All active duty personnel are subject to the UCMJ and amenable to court-marital jurisdiction throughout their period of active service. Status as an active-duty service member, and hence court-martial jurisdiction over such persons, ordinarily begins with enlistment or commissioning and terminates with the delivery of a valid discharge certificate or separation order.

Members of a reserve component in federal service on active duty, as well as those in federal service on inactive-duty training, are also subject to the UCMJ. A reservist remains subject to court-martial jurisdiction without regard to any change between active and reserve service or any change within different categories of reserve service for offenses committed while on active duty or in an inactive-duty training status. This does not apply, however, to a reserve member whose military status is completely terminated after commission of an offense.

Members of the Army National Guard or the Air National Guard are not subject to the Uniform Code of Military Justice unless performing Federal service.

Worldwide Jurisdiction. The United States military deploys worldwide, often on short notice, with large numbers of military personnel and unique disciplinary requirements. Since most American criminal laws are not applicable outside of the United States, it is important to have a system of criminal justice that can wherever our troops are deployed. As such, the military services need a flexible, separate, military justice system capable of operating in times of peace or conflict, under the same standards at home or abroad. That system is the Uniform Code of Military Justice, or "the Code." It is a system of criminal justice that is deployable and applies in all places.

The Uniform Code of Military Justice (UCMJ) is found at Sections 801 through 946 of Title 10, United States Code. Enacted in 1950 as a major revision of then-existing military criminal law, the UCMJ became effective the following year. The UCMJ has been amended on a number of occasions since then, with significant changes occurring in 1968 and 1983. It is promulgated by Congress pursuant to the Constitution and includes the system's jurisdictional basis, substantive offenses, and the basic procedural structure.

In the military justice system, courts-martial have the power to try any offense under the Uniform Code of Military Justice, except when prohibited from so doing by the Constitution.

The rule enunciated by the U. S. Supreme Court in Solorio v. United States, 483 U.S. 43 (1987), is that jurisdiction of courts-marital depends solely on the accused's military status as a person subject to the Uniform Code of Military Justice, not on a "service-connection" requirement regarding the offense charged. Any violation of the Code is now within the military's jurisdiction, regardless of whether the offense was committed at home or abroad, on or off the military installation, or while the member was on or off duty.

Offenses. The UCMJ is essentially a complete set of criminal laws. It includes many crimes punished under civilian law (e.g., murder, rape, drug use, larceny, drunk driving, etc.), but it goes beyond that to punish other conduct which affects good order and discipline in the military.

These "unique military offenses" involve conduct that need not be made criminal in civilian life, but must be made offenses in a military justice system because the misconduct goes to the heart of military duties. For example, in civilian life, if people choose to be disrespectful to a civilian supervisor, or if they choose not to go to work or to quit their job for any reason – that decision does not potentially violate any criminal laws and is a matter between them and their supervisor. Military members, however, have tremendous responsibilities and must be counted upon to perform them. These responsibilities require that the military have a disciplinary system that enables commanders to respond to such misconduct - potentially with criminal charges. When a military member doesn't report for duty, the consequences to the mission and national security can be quite severe. Unique military crimes include, for example, such offenses as desertion, absence without leave, disrespect towards superiors, failure to obey orders, dereliction of duty, wrongful disposition of military property, drunk on duty, malingering, and conduct unbecoming an officer. The UCMJ also includes provisions punishing misbehavior before the enemy, improper use of countersign, misbehavior of a sentinel, misconduct as a prisoner, aiding the enemy, spying, and espionage. Some of those offenses are capital offenses, meaning the maximum punishment is death. The UCMJ reflects the seriousness and importance of the military's mission and recognizes that ultimately the safety of our forces and the security of our nation are being protected.

Officers' Special Responsibilities. Traditionally, all military systems place additional and special responsibilities upon officers. Article 133 of the Uniform Code of Military Justice (10 USC § 933) establishes the offense of "conduct unbecoming an officer and gentleman (or gentlewoman)." This article may be violated by any action or behavior in an official capacity that, in dishonoring or disgracing the person as an officer, seriously compromises that person's character or standing as an officer.

In addition to the enumerated punitive articles of the Uniform Code of Military Justice, Article 134, (10 USC § 934), makes punishable acts in three categories of offenses not specifically covered in any other article of the code. These are referred to as "Clauses 1, 2, and 3" of Article 134. Clause 1 offenses involve disorders and neglects to the prejudice of good order and discipline in the armed forces. Clause 2 offenses involve conduct of a nature to bring discredit upon the armed forces. An act in violation of a local civil law or of a foreign law may be punished if it constitutes a disorder or neglect to the prejudice of good order and discipline in the armed forces or it is of a nature to bring discredit upon the armed forces.

Clause 3 offenses involve noncapital crimes or offenses that violate Federal law. Certain noncapital crimes and offenses prohibited by the United States Code are made applicable under clause 3 of Article 134 to all persons subject to the code, wherever the wrongful act or omission occurred. These are referred to as crimes and offenses of unlimited application.

Clause 3 offenses also involve offenses made applicable to the military through the Federal Assimilative Crimes Act. These are referred to as crimes and offenses of local application. The Federal Assimilative Crimes Act is Congress' adoption of state criminal laws for areas of "exclusive or concurrent" federal jurisdiction, in so far as the federal criminal law (including the UCMJ) has not already prescribed an applicable offense for the misconduct committed. For example, if a person committed an act on an exclusive jurisdiction area of a military installation in the United States, and it was not an offense specifically defined by federal law (including the UCMJ), the military person committing the act could be punished by a court-marital. The additional requirements would be that the misconduct was not specified as an existing UCMJ offense and that the offense was not a capital offense under the law of the State where the military installation was located.

The UCMJ does not classify offenses as petty offenses, misdemeanors, or felonies. Whether an offense is considered within any of these classifications is a matter of other federal or state law definitions..

Types of Courts-Martial. There are three types of courts-martial - summary, special and general.

Summary Court-Martial. Trial by summary court-martial provides a simplified procedure for the resolution of charges involving minor incidents of misconduct. The summary court-martial consists of one officer who, depending upon Service policies and practice, is a judge advocate (a military attorney). The maximum punishment a summary court-martial may impose is considerably less than a special or general court-martial. The accused must consent to be tried by a summary court-martial.

Special Court-Martial. A special court-martial is the intermediate court level. It consists of a military judge, trial counsel (prosecutor), defense counsel, and a minimum of three officers sitting as a panel of court members or jury. An enlisted accused may request a court composed of at least one-third enlisted personnel. An accused, officer or enlisted, may also request trial by judge alone. Regardless of the offenses involved, a special court-martial sentence is limited to no more than six months confinement (or a lesser amount if the offenses have a lower maximum), forfeiture of two-third's basic pay per month for six months, a bad-conduct discharge (for enlisted personnel), and certain lesser punishments. An officer accused in a special court-martial cannot be dismissed from the service or confined.

General Court-Martial. A general court-martial is the most serious level of military courts. It consists of a military judge, trial counsel, defense counsel, and at least five court members. Again, an enlisted accused may request a court composed of at least one-third enlisted personnel. Unless the case is one in which the death sentence could be adjudged, an officer or enlisted accused may also request trial by judge alone. In a general court-martial, the maximum

punishment is that established for each offense under the Manual for Courts-Martial, and may include death (for certain offenses), confinement, a dishonorable or bad-conduct discharge for enlisted personnel, a dismissal for officers, or a number of other lesser forms of punishment. A pretrial investigation under Article 32, UCMJ, must be conducted before a case may be referred to a general court-martial, unless waived by the accused.

Joint Jurisdiction. Courts-martial have exclusive jurisdiction over purely military offenses. In the case of an offense that violates the Uniform Code of Military Justice and the criminal law of a State, other Federal law, or all three, it must be determined which jurisdiction will prosecute. This decision is normally made through coordination between appropriate military authorities (ordinarily the chief military lawyer at an installation (Staff Judge Advocate)) and appropriate civilian authorities (United States Attorney or District Attorney's Office).

The fact that an accused is subject to trial by court-martial does not eliminate the possibility of trial by another jurisdiction, either in addition to or in lieu of court-martial. Under the United States Constitution, a person may not be tried for the same misconduct by both a court-martial and another federal court. Such an act would violate the Constitution's double jeopardy clause.

Criminal prosecution in both federal and state courts is also a constitutional possibility. The Constitution's double jeopardy clause is not applicable because two different sovereigns are involved, i.e. the federal government and state government. As a matter of policy, however, a person who is pending trial or has been tried by a State court is ordinarily not tried by court-martial for the same act.

Commission of an offense overseas may result in trial by the host nation. Under international law, a foreign nation has jurisdiction to punish offenses committed within its borders by members of a visiting force, unless it expressly or impliedly consents to relinquish its jurisdiction to the visiting sovereign. Generally, the United States has concluded Status of Forces agreements with host nations that indicate which sovereign will have primary jurisdiction over particular offenses. To the extent possible, efforts are made under such agreements to maximize the exercise of court-martial jurisdiction over military members or other persons subject to the Uniform Code of Military Justice.

REPORTING CRIME AND FIRST STAGES OF INVESTIGATION IN THE MILITARY

In the military, reporting and investigating crime differs from civilian communities. In most civilian communities, individuals report crimes to their local police departments. The police then conduct investigations and make initial decisions about whether to charge someone for minor offenses (i.e., by issuing tickets). The police refer major offenses to the local district attorney, who decides whether to file serious charges. The local district attorney, acting on behalf of the community, then decides how both minor and major cases are to be handled in court. Local courts try the cases and impose punishments.

Under the direction of the President, military commanders are responsible for maintaining law and order in the communities over which they have authority, and for maintaining the discipline of the fighting force. Reports of crimes by servicemembers ultimately come to their commanders' attention from law enforcement or criminal investigative agencies, as well as reports from individual servicemembers. In many minor cases involving military offenses, there has been no formal investigation by any law enforcement agency (including military police).

To help commanders decide how to resolve charges, commanders must make a "preliminary inquiry" into any allegations against a member of the command under military procedural Rules for Courts-Martial (R.C.M.) found in the Manual for Courts-Martial. These informal inquiries are sometimes referred to as R.C.M. 303 Inquiries. The commander can conduct this inquiry himself, appoint someone else in his command to do it, or, as happens in very serious cases, request assistance from civilian or military criminal investigative agencies. Although usually informal, the commander can require a more formal inquiry and a written report.

As noted, in complex or serious cases, commanders may need specialized, investigative assistance from military criminal investigative organizations to decide whether to prefer (initiate or “press”) charges. Although these organizations are independent of the command and possess independent investigative authority, they also provide professional investigative support to commanders upon request.

When the commander finishes the preliminary inquiry, he must make a decision on how to resolve the case. Unlike civilian communities, where a district attorney decides whether or not to “press” charges, in the military, commanders make that decision. The commander could decide that no action at all is warranted. Or he could take administrative action, such as an admonition or reprimand, or making an adverse comment in performance evaluations, or seeking discharge of the member from the service. The commander also possesses nonjudicial punishment authority under the procedures of Article 15, UCMJ. The commander may also determine that criminal charges are appropriate. The "preferral" of charges, similar to "swearing out a complaint" in civilian jurisdictions, initiates the court-martial process.

SUSPECT RIGHTS

Self-Incrimination Protections. The military justice system provides an accused rights and due process that in many ways are superior to those provided a defendant in civilian criminal courts. Pursuant to Article 31, Uniform Code of Military Justice (Section 831 of Title 10, United States Code), servicemembers have a right against self-incrimination and an entitlement to be informed of the suspected offense(s) before questioning begins. In addition to protections against self-incrimination, servicemembers have a right to free military counsel when questioned as a suspect of committing an offense, upon preferral of court-martial charges, or initiation of arrest or apprehension.

In the military justice system, these rights are afforded much earlier in the criminal justice system than in civilian practice. These rights and protections apply whenever the servicemember is questioned as a suspect of an offense. In civilian practice, Miranda rights or warnings are not required unless there is custodial interrogation by law enforcement personnel. In fact, the U. S. Supreme Court referenced the military's "warning rights" practice under Article 31, UCMJ, when deciding to establish the "Miranda Warning" requirement. A showing of indigence is required before a defendant is provided counsel without cost in the civilian system.

Article 31, UCMJ Rights. Article 31 has two important parts:

1. No one subject to the Uniform Code of Military Justice may compel any person to incriminate himself or to answer any question the answer that may tend to incriminate him.

2. No person subject to the Uniform Code of Military Justice may interrogate, or request any statement from a person suspected of an offense without first informing him of the nature of the accusation, that he does not have to made a statement regarding the offense, and that any statement may be used against him as evidence in a trial by court-martial.

Right To Counsel. An independent military defense counsel is provided free of charge regardless of the accused's ability to pay. The accused may also employ civilian counsel at his or her own expense, or request a particular military counsel, who will assist the accused if reasonably available. The accused has the right to be represented by counsel at the magistrate hearing when a determination is made regarding continued pretrial confinement, at the Article 32 investigation, and during all court-martial sessions. After trial, the accused has a right to free military counsel to assist with his appeal through the military appellate courts, and potentially to the U.S. Supreme Court.

PRETRIAL CONFINEMENT IN THE MILITARY

Pretrial confinement in the military is similar to the civilian system in some respects and different in others. In the civilian community, police arrest serious offenders and take them to jail. In military cases, servicemembers who are "apprehended" ("arrest" has a different technical meaning in the military) are typically turned over to a member of command authority. The command then decides whether to confine the member in a military jail (called "brig" or "stockade" or “confinement”). The command may also impose pretrial "restrictions" instead of confinement. For instance, the servicemember may be restricted to his post or base, pending trial. Before any servicemember is confined or restrained, there must be "probable cause" (a reasonable belief) that the servicemember committed an offense triable by courts-martial and that confinement or restriction is necessary under the circumstances.

In addition, like a civilian policeman, any military officer can order an enlisted servicemember to be confined. The decision to confine a military member is the subject of several reviews. The military justice system follows the civilian requirement that a review of the decision to confine the person be conducted within 48 hours. Within 72 hours, the military member is entitled to have his commanding officer review whether his continued confinement is appropriate. (However, if someone other than the commanding officer confined the member and the commanding officer review was actually conducted within 48 hours, then this commanding officer review can serve to satisfy both review requirements.) Thereafter, a military magistrate who is independent of the command must conduct another review within 7 days. Finally, a military member may request the military judge assigned to the case review the appropriateness of the pretrial confinement.

Throughout the confinement review process, a servicemember is provided a military lawyer, at no expense, to assist him or her. These reviews must confirm, in writing, that there is probable cause to believe that the servicemember committed an offense triable by courts-martial; that confinement is necessary to prevent the servicemember from fleeing or engaging in serious criminal misconduct; and that lesser forms of restraint would be inadequate. These review requirements may be suspended by the Secretary of Defense when operational necessities make them impractical. For the same reason, these requirements are not applicable to ships at sea.

When his charges are "referred" or presented to a court-martial, the confined servicemember may ask the military judge presiding over the court to review his pretrial confinement again. If rules were violated, the military judge can release the servicemember, and he can reduce any subsequent sentence, giving additional credit for inappropriate confinement.

In the civilian community, persons accused of crimes who might flee or commit other crimes may also be confined prior to their trial. A civilian magistrate must review this confinement within 48 hours. In many cases, the magistrate will require confinees to post bail to ensure their return for trial. While awaiting trial, a civilian confinee usually does not receive pay and may actually lose his or her job. Servicemembers do not have to post bail, receive their regular military pay, and do not lose their jobs while awaiting trial.

RIGHT TO COUNSEL FOR NONJUDICIAL PUNISHMENT & COURT-MARTIAL ACTIONS

Right To Counsel for Nonjudicial Punishment (NJP). The statute governing NJP (Section 815 of Title 10, United States Code) does not create a right for servicemembers to consult with counsel after being notified of the commander's intent to dispose of an allegation by NJP. The services have different regulatory policies regarding whether servicemembers have the absolute right to consult with counsel. These regulations differ based on the unique concerns of each of the services in balancing the need to maintain discipline and protections for servicemembers. Air Force personnel have an absolute right to consult with a defense counsel prior to determining whether to accept NJP proceedings or demand trial by court-martial for all NJP. Army personnel have the right to consult with a defense counsel, except when the commander is utilizing Summarized NJP Proceedings. Navy, Marine Corps and Coast Guard personnel do not have a right to consult with counsel prior to NJP, however, commanders from those services strongly encourage consultation with counsel, subject to the availability of counsel, the delay involved, or operational commitments or military exigencies.

When military defense counsel services are provided, it is at no charge to the servicemember. Consultation with an attorney may be by telephone. Service personnel may also consult with civilian counsel at no expense to the government.

Right To Counsel for Courts-Martial. The statute governing right to counsel (Section 838(b) of Title 10, United States Code) defines the accused's right to various counsel. The accused has the right to be represented at court-martial by a detailed military defense counsel, who is provided at no expense to the accused.

The accused also has the right to request, by name, a different military lawyer. If that attorney is reasonably available, he or she is appointed to represent the accused free of charge. If the request for the other military attorney is granted, the accused does not have the right to keep the services of the detailed defense counsel because the accused is only entitled to one military lawyer. However, the accused may also request to keep his or her detailed counsel, but the attorney's superiors do not have to grant such a request.

In addition, the accused has the right to be represented by a civilian lawyer at no expense to the government. If a civilian lawyer represents the accused, the accused can also keep his or her military attorney on the case to assist the civilian lawyer. Alternatively the accused could excuse his military lawyer and be represented only by the civilian lawyer.

Although rarely exercised, the accused also has the right to represent himself.

NONJUDICIAL PUNISHMENT (NJP)

Command Leadership Tool. Nonjudicial punishment (NJP) is a leadership tool providing military commanders a prompt and essential means of maintaining good order and discipline. NJP proceedings may be known by different terms among the Services, such as "Article 15", "Office Hours" or "Captain's Mast", but the purpose of NJP, and for the most part its procedures, are common among the Services.

For Minor Offenses. NJP is used to discipline members for minor violations of the Uniform Code of Military Justice (UCMJ) and serves to correct misconduct without attaching the stigma of a court-martial conviction to the member. The Manual for Courts-Martial defines a minor offense for NJP purposes as "ordinarily an offense which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than one year if tried by a general court-martial." NJP is a disciplinary measure more serious than administrative action (e.g. a letter of reprimand), but less serious than trial by court-martial.

Article 15, UCMJ, And Regulations. NJP is permitted by Article 15, UCMJ (Section 815 of Title 10, United States Code) and is governed by Part V of the Manual for Courts-Martial and by service regulations. Prior to imposition of NJP, a servicemember must first be notified by the commander of the nature of the misconduct of which he or she is accused, of the evidence supporting the accusation, and of the commander's intent to impose NJP. The member may then be allowed to consult with a defense counsel to determine whether to consent to a NJP proceeding, or to refuse NJP and demand instead a trial by court-martial. The major difference among the services with regard to NJP is that servicemembers attached to or embarked in a vessel may not refuse imposition of NJP.

Accused Ultimately Chooses the Forum. Consenting to participation in a nonjudicial punishment proceeding is not an admission of guilt. By accepting, the accused declines to exercise the right to demand trial by court-martial regarding the offenses alleged. If an accused demands trial when presented with a proposed NJP action, the commander is thereafter prohibited from going forward with nonjudicial punishment. Prior to imposing NJP, the commander will hold a hearing at which the member may be present. The member may also have a spokesperson attend the hearing, may present evidence to the commander, and may request that the commander hear from certain witnesses. The commander must consider any information offered during the hearing, and must be personally convinced that the member actually committed misconduct before imposing punishment.

Permissible Punishments. Permissible punishments for enlisted personnel can include such actions as reduction in rank, forfeiture of pay (up to ½ of one month's pay per month for two months), restriction to base or to the ship (up to 60 days), extra duties, correctional custody (up to 30 days), and a reprimand. For officers, permissible punishments can include forfeiture of pay (up to ½ of one month's pay per month for two months), restriction to base or to the ship (up to 60 days), arrest in quarters (up to 30 days), and a reprimand. The actual maximum punishment under the circumstances depends upon the rank of the commander who imposes the punishment. Higher-ranking commanders may impose greater punishments than lower-ranking commanders may.

Right To Appeal. If the member considers the punishment to be unjust or to be disproportionate to the misconduct committed, he or she may appeal to higher authority. The appeal authority may set aside the punishment, decrease its severity, or deny the appeal, but may not increase the severity of the punishment.

Not A Conviction Record. Receipt of a nonjudicial punishment does not constitute a criminal conviction.

THE COMMANDER'S DISCIPLINARY OPTIONS

Prosecutorial Discretion. In civilian communities, police and prosecutors exercise discretion in deciding whether an offense should be charged and offenders punished. In the military, commanders make this decision. Once the investigation is complete, the commander must make a decision about how to dispose of the case. Throughout the investigation, the commander has a lawyer (judge advocate) available to assist and provide advice. With the assistance of his lawyer, the commander decides whether a case will be resolved administratively, through a nonjudicial punishment action under Article 15, UCMJ, or referred to trial, and what the charges will be. The disposition decision is one of the most important and difficult decisions facing a commander. Each commander in the chain of command has independent, yet overlapping discretion to dispose of offenses within the limits of the officer's authority. The commander at the lowest level makes the initial decision regarding disposition. Under the Uniform Code of Military Justice (UCMJ), superior commanders may not seek to improperly influence the subordinate commander's exercise of independent judgment or disciplinary action. However, nothing prevents a superior commander from withholding authority to himself or herself to dispose of offenses in individual cases or types of cases (e.g., officers; drug cases, DUI).

Levels Of Disposition. Charges can be disposed of at four levels within the military justice system: (1) by the unit commander who exercises immediate Article 15, UCMJ, jurisdiction over the accused; (2) by the summary court-martial convening authority (normally a battalion or squadron commander); (3) by the special court-martial convening authority (normally a brigade or wing commander); and (4) by the general court-martial convening authority (normally a general officer who is commanding). Each commander or convening authority within the military justice chain has a range of available options and each commander exercises discretion in selecting one of the available options or makes a recommendation to a higher commander. As charges progress up the military justice chain, the convening authority has more options available. Any higher-level convening authority has all the powers and alternatives of any lower-level convening authority or commander. Thus a summary court-martial convening authority has available all the options of the immediate commander and additional alternatives as a convening authority. Similarly, a special court-martial convening authority is empowered to convene a summary court-martial as well as a special court-martial. Finally, a general court-martial convening authority possesses all the powers of the subordinate commanders and convening authorities.

Commander's Range Of Options. The commander has a number of options available for the resolution of disciplinary problems. Briefly summarized, they are as follows:

1. The commander may choose to take no action. While this may seem to be unusual, the circumstances surrounding an event actually may warrant that no adverse action be taken. The preliminary inquiry might indicate that the accused is innocent of the crime, that the only evidence is inadmissible, or the commander may decide that other valid reasons exist not to prosecute. A subordinate commander's decision not to take action is not binding on a superior commander's independent authority to take action.

2. The commander may initiate administrative action against a servicemember. The commander might determine that the accused committed an offense, but that the best disposition for this offense and this offender is to take administrative rather than punitive action. A commander can initiate action against the servicemember, alone or in conjunction with action under the UCMJ. Administrative action is not punitive in character; instead, it is meant to be corrective and rehabilitative. Administrative actions include measures ranging from counseling or a reprimand to involuntary separation.

3. The commander may dispose of the offense with nonjudicial punishment. Article 15, UCMJ, is a means of handling minor offenses requiring immediate corrective action. A minor offense is one for which the maximum sentence imposable at a court-martial would not include a dishonorable discharge or confinement in excess of one year. If a commander imposes Article 15 punishment for a minor offense, trial by court-martial is barred. If a commander imposes Article 15 punishment, but the offense is not minor, later trial by court-martial is not barred. Nonjudicial punishment hearings are non-adversarial. They are not a "mini-trial" with questioning by opposing sides. The commander conducts the hearing. The servicemember may request an open or closed hearing, speak with an attorney about his case, have someone speak on his behalf, and present witnesses who are reasonably available. The rules of evidence do not apply. In order to find the servicemember "guilty," the commander must be convinced that the servicemember committed the offense. Generally speaking, the UCMJ and Manual for Courts-Martial establish maximum punishment limits based on the rank of the commander imposing punishment and the rank of the servicemember being punished. The servicemember has a right to appeal the imposing commander's decision to the next-higher commander.

4. The commander may dispose of the offenses by court-martial. If the commander decides that the offense is sufficiently serious under the circumstances to warrant trial by court-martial, the commander may exercise the fourth option, preferring (initiating) charges and forwarding them to a commander possessing court-martial convening authority. Whenever charges are forwarded to a superior commander for disposition, the subordinate commander must make a personal recommendation as to disposition, to include the level of court that the subordinate commander believes to be appropriate. Here again, the commander first has the benefit of legal advice from his attorney (judge advocate).

The Accuser and How Charges Are Filed. The person who signs the charge sheet and attests to the accuracy of the charges is known as the accuser. Charges are filed under the Uniform Code of Military Justice by act of "preferral." Although, any person subject to the Uniform Code of Military Justice may prefer charges, in most instances the unit commander prefers the charges.

Preferral Process. Charges are preferred (formally initiated) when the accuser, under oath, signs them before a commissioned officer of the armed forces authorized to administer oaths. The accuser must also state that he has personal knowledge or has investigated the matters set forth therein and believes they are true in fact to the best of his or her knowledge and belief. When an immediate commander acts as accuser, the commander may rely on the information developed in an investigative report.

ARTICLE 32 INVESTIGATIONS

Purpose. The Fifth-Amendment constitutional right to grand jury indictment is expressly inapplicable to the Armed Forces. In its absence, Article 32 of the Uniform Code of Military Justice (Section 832 of Title 10, United States Code), requires a thorough and impartial investigation of charges and specifications before they may be referred to a general court-martial (the most serious level of courts-martial). However, the accused may waive the Article 32 investigation requirement. The purpose of this pretrial investigation is to inquire into the truth of the matter set forth in the charges, to consider the form of the charges, and to secure information to determine what disposition should be made of the case in the interest of justice and discipline. The investigation also serves as a means of pretrial discovery for the accused and defense counsel in that copies of the criminal investigation and witness statements are provided and witnesses who testify may be cross-examined.

Procedures. An investigation is normally directed when it appears the charges are of such a serious nature that trial by general court-marital may be warranted. The commander directing an investigation under Article 32 details a commissioned officer as investigating officer, who will conduct the investigation and make a report of conclusions and recommendations. This officer is never the accuser. This officer may or may not have any legal training, although the use of military attorneys (judge advocates) is common within Service practice. If the investigating officer is not a lawyer, he or she may seek legal advice from an impartial source, but may not obtain such advice from counsel for any party.

An investigative hearing is scheduled as soon as reasonably possible after the investigating officer's appointment. The hearing is normally attended by the investigating officer, the accused and the defense counsel. In some cases, the commander will also detail counsel to represent the United States, a court reporter and an interpreter. Ordinarily, this investigative hearing is open to the public and the media.

The investigating officer will, generally, review all non-testimonial evidence and then proceed to examination of witnesses. Except for a limited set of rules on privileges, interrogation, and the rape-shield rule, the military rules of evidence (which are similar to the federal rules of evidence) do not apply at this investigative hearing. This does not mean, however, that the investigating officer ignores evidentiary issues. The investigating officer will comment on all evidentiary issues that are critical to a case's disposition. All testimony is taken under oath or affirmation, except that an accused may make an unsworn statement.

The defense is given wide latitude in cross-examining witnesses. If the commander details an attorney to represent the United States, this government representative will normally conduct a direct examination of the government witnesses. This is followed by cross-examination by the defense and examination by the investigating officer upon completion of questioning by both counsel. Likewise, if a defense witness is called, the defense counsel will normally conduct a direct examination followed by a government cross-examination. After redirect examination by the defense counsel, or completion of questioning by both counsel, the investigating officer may conduct additional examination. The exact procedures to be followed in the hearing are not

specified in either the Uniform Code of Military Justice or the Manual for Court-Martial. The investigating officer, however, will generally:

- Announce the beginning of the investigation and its purpose
- Advise the accused of his or her right to counsel and ascertain whether the accused will be represented by counsel, and if so, by whom
- Formally read the charges preferred against the accused
- Advise the accused of his or her rights to make a statement or to remain silent
- Review the documentary or real evidence available against the accused
- Call any available adverse witnesses
- Review documentary or real evidence in favor of the accused
- Call available favorable witnesses for the accused
- Hear any evidence presented by the accused
- Hear any statement the accused or defense counsel may make
- Entertain, if any, arguments by counsel

Upon completion of the hearing, the investigating officer submits a written report of the investigation to the commander who directed the investigation. The report must include:

- Names and organizations or addresses of defense counsel and whether they were present throughout the taking of evidence, or if not, why not
- The substance of any witness testimony taken
- Any other statements, documents, or matters considered by the investigating officer
- A statement of any reasonable grounds for belief that the accused was not mentally responsible for the offense, or was not competent to participate in the defense during the investigation, or there is a question of the accused's competency to stand trial
- A statement whether the essential witnesses will be available at the time anticipated for trial or a statement why any essential witness may not then be available
- An explanation of any delays in the investigation
- The investigating officer's conclusion whether the charges and specifications are in proper form
- The investigating officer's conclusion whether reasonable grounds exist to believe that the accused committed the offenses alleged
- The recommendations of the investigating officer, including disposition of the charges

Upon completion, the report is forwarded to the commander who directed the investigation for a decision on disposition of the offenses.

Rights Of the Accused. The accused at an Article 32 investigation has several important rights.

The accused also has a right to waive an Article 32 investigation and such waiver may be made a condition of a plea bargain. If the investigation is not waived, the accused is entitled to be present throughout the investigative hearing (unlike a civilian grand jury proceeding). At the hearing, the accused has the right to be represented by an appointed military defense counsel or may request an individual military defense counsel by name and may hire a civilian attorney at

his or her own expense. Again, unlike a civilian grand jury proceeding, the servicemember, through the member's attorney, has the following rights: to call witnesses; to present evidence; to cross-examine witnesses called during the investigation; to compel the attendance of reasonably available military witnesses; to ask the investigating officer to invite relevant civilian witnesses to provide testimony during the investigation; and, to testify, although he or she cannot be compelled to do so.

The accused must be served with a copy of the investigative report and associated evidence. Within five days of receipt, the accused may submit objections or comments regarding the report to the commander who directed the investigation.

Comparison to the Civilian Preliminary Hearing and Grand Jury Process. The Article 32 investigation has often been compared to both the civilian preliminary hearing and the civilian grand jury since it is functionally similar to both. All three of these proceedings are theoretically similar in that each is concerned with determining whether there is sufficient probable cause (reasonable grounds) to believe a crime was committed and whether the person accused of the crime committed it. The Article 32 investigation, however, is broader in scope and more protective of the accused. As such, it is not completely analogous to either proceeding.

A civilian defendant at a preliminary hearing may have the right to counsel, the right to cross-examine witnesses against him or her, and the right to introduce evidence in his or her behalf. An Article 32 investigation is considered broader in scope because it serves as a mechanism for discovery by the defense, and because it supplies the convening authority (the decision authority) with information on which to make a disposition decision. While a decision by a magistrate at a preliminary hearing is generally final, the investigating officer's decision is merely advisory.

Unless waived, a civilian defendant may be prosecuted in a federal court for an offense punishable by death, imprisonment for a term exceeding one year, or imprisonment at hard labor only after indictment by a grand jury. (An indictment is a formal written accusation or charge). This Fifth Amendment constitutional right does not apply to state prosecutions - although some state constitutions and statutes have provisions that are analogous to the Fifth Amendment and require an indictment by a grand jury for a felony or other defined offenses. Accordingly, if a service member is tried in a state court, his or her right to indictment by grand jury is dependent upon the particular state's procedures.

The grand jury is a closed, secret proceeding, in which only the prosecution is represented. The body of jurors decides to indict based upon evidence frequently provided solely by the prosecutor. This may even happen without the accused even having knowledge of the proceeding. Inspection or disclosure of the transcript of the proceeding after indictment is also, generally, severely limited. Obviously, by his absence, a defendant is precluded from the opportunity to confront and cross-examine witnesses, to present evidence, call witnesses in his or her favor, or even to speak for him or herself. If a defendant is called before a grand jury, he or she has no right to have a lawyer present through or at any other part of the proceeding. If a

grand jury does not indict, the decision is generally final and charges against the defendant are usually dismissed.

The Article 32 investigation, in contrast, is generally an open proceeding that may be attended by the public. Unlike a grand jury proceeding, the accused has the right to be present at the investigation; the right to be represented by an attorney; the right to present evidence; the right to review a copy of the investigative report as well as the several other important rights discussed above. Again, the recommendation of the Article 32 investigating officer is not final - it is only advisory.

Beyond Article 32 of the Uniform Code of Military Justice (Section 832 of Title 10, United States Code), additional rules on Article 32 investigations are contained at Rule for Courts-Martial (R.C.M) 405, as supplemented by case law and service regulations.

REFERRAL OF CHARGES AND CONVENING A COURT-MARTIAL

The Armed Forces do not have permanently established trial courts for prosecuting military members. Courts-martial (military criminal trial courts) are convened (established) by commanders possessing the authority to do so, on an "as needed" basis.

Court-Martial Convening Authority. Congress, through the Uniform Code of Military Justice (UCMJ), specifies which commanders and officials possess the authority to convene a court-martial. A commander who possesses the authority to convene a court-martial is known as a Convening Authority (CA). The CA convenes a court-martial by issuing an order that charges previously preferred (initiated) against an accused servicemember will be tried by a specified court-martial. This order is called a "convening order" and shall designate the type of court-martial (summary, special or general) that will try the charges. The convening order may designate when and where the court-martial will meet.

Detailing the Court-Martial Panel. For special and general courts-martial, the convening order will also designate the members of the court-martial panel (the military equivalent of the jury). Although the ultimate membership of the panel is determined, as in the civilian system, through voir dire, the CA initially details the panel members to the court-martial. As required by Congress in Article 25, UCMJ, the CA must choose members who are best qualified to serve based on their age, education, training, experience, length of service, and judicial temperament. However, it is the accused's choice whether he or she will be tried by a panel of officers, a combined panel of officers and enlisted members, or by the military judge sitting alone.

Types Of Courts-Martial. The characteristics of the different types of courts-martial are described below.

SUMMARY COURT-MARTIAL

A summary court-martial has jurisdiction over all personnel, **except** commissioned officers, warrant officer, cadets, aviation cadets, and midshipmen, charged with a UCMJ offense referred to it by the convening authority.

- Composed of one commissioned officer on active duty, usually pay grade O-3 or above
- The accused member is not entitled to be represented by a military attorney, but may hire a civilian lawyer at his own expense. [In rare cases, military exigencies may preclude the reasonable availability of civilian counsel.] As a matter of Air Force policy, all accused at summary courts-martial are afforded representation by military counsel.
- The accused member may object to trial by summary court-martial, in which case the charges are returned to the convening authority for further action (e.g., disposition other than by court-martial or action to send the charges to a special or general court-martial)
- The maximum punishment a summary court-martial may award is: confinement for 30 days, forfeiture of two-thirds pay for one month, and reduction to the lowest pay grade (E-1)

- In the case where the accused is above the fourth enlisted pay grade, a summary court-martial may not adjudge confinement, hard labor without confinement, or reduction except to the next lowest pay grade

SPECIAL COURT-MARTIAL

A special court-martial has jurisdiction over all personnel charged with any UCMJ offense referred to it by the convening authority.

- Composed of not less than three members, which may include commissioned officers and enlisted members (at the accused's request)
- Usually presided over by a military judge
- The military judge may conduct the trial alone, if requested by the accused
- A military lawyer is detailed to represent the accused member at no expense to the accused. The member may instead request that a particular military attorney, if reasonably available, represent him or her
- The member may also retain a civilian attorney at no expense to the government
- The prosecutor is a military lawyer (judge advocate), unless precluded by military exigencies
- The maximum punishment a special court-martial may adjudge is: confinement for six months, forfeiture of two-thirds pay for six months, reduction to the lowest pay grade (E-1), and a bad conduct discharge

GENERAL COURT-MARTIAL

A general court-martial has jurisdiction over all personnel charged with any UCMJ offense referred to it by the convening authority.

- Unless the accused waives this right, no charge may be referred to a general court-martial until a thorough and impartial investigation into the basis for the charge has been made. This pretrial proceeding is known as an "Article 32" investigation or preliminary hearing and essentially serves the equivalent function of a grand jury hearing in civilian jurisdictions
- Composed of a military judge and not less than five members, which may include commissioned officers (and enlisted members at the accused's request)
- In non-capital cases, military judges may conduct the trial alone at the accused's request
- A military lawyer is detailed to represent the accused member at no expense to the accused. The member may instead request that a particular military attorney, if reasonably available, represent him or her
- The member may also retain a civilian attorney at no expense to the government
- The prosecutor must be a military lawyer (judge advocate)
- A general court-martial may adjudge any sentence authorized by the Manual for Courts-Martial for the offenses that the accused is found to have committed

Independent Defense – Independent Judiciary. It is the duty of military defense counsel to zealously represent their clients' legal interests. It is the duty of military judges to be fair and

impartial in overseeing trials, applying the law, and if applicable, passing judgement and sentence upon an accused servicemember. Defense counsel and military judges are assigned to an independent judiciary within the military, with command and performance rating chains that are separate from those of the prosecutors and convening authorities. To further insure complete independence, prosecutors, defense counsel, and military judges maintain separate office facilities.

UNLAWFUL COMMAND INFLUENCE

Mortal Enemy. Unlawful Command Influence (UCI) has frequently been called the "mortal enemy of military justice." UCI occurs when senior personnel, wittingly or unwittingly, have acted to influence court members, witnesses, or others participating in military justice cases. Such unlawful influence not only jeopardizes the validity of the judicial process, it undermines the morale of military members, their respect for the chain of command, and public confidence in the military.

While some types of influence are unlawful and prohibited by the Uniform Code of Military Justice (UCMJ), other types of influence are lawful, proper, and in certain circumstances a necessary part of leadership. The prohibition against UCI does not mean that a commander may abdicate responsibility for correcting disciplinary problems. Rather, the commander must vigilantly insure that the command action does not encroach upon the independence of the other participants in the military justice system.

Rules In General. Here are some general rules regarding Unlawful Command Influence:

- The Commander may not order a subordinate to dispose of a case in a certain way. The law gives independent discretion to each commander at every level possessing authority to convene courts-martial. A senior commander may not try to influence the exercise of that discretion. However, a senior commander may:

    - *Personally* dispose of a case at the level authorized for that offense and for that commander
    - Send a case back to a lower-level commander for that subordinate's *independent* action
    - Send a case to a *higher* commander with a recommendation for disposition
    - *Withdraw* subordinate authority on particular types of cases
    - *Order* charges pending at a lower level transmitted up for further consideration, including, if appropriate, referral
      Mentor subordinates, but do so recognizing that there exists the potential for misinterpreting the commander's intentions

- The commander must not have an inflexible policy on the disposition of a case or the punishment to be imposed. A convening authority must consider each case individually on its own merits

- A commander who is the accuser, may not thereafter act as a convening authority to refer the case to a court-martial. The commander is considered to be "disqualified" to act as a convening authority and must forward the charges to a superior convening authority. A commander is considered to be an accuser when he or she:

    - Formally signs and swears to the charges on the charge sheet (prefers the charges), or

- Directs that the charges be signed and sworn to by another, or

- Has an interest, other than an official interest, in the prosecution of the accused

- The commander may neither select nor remove court members in order to obtain a particular result in a particular trial. Selections must be based upon the criteria contained in Article 25, UCMJ. Those criteria include: age and experience, education and training, length of service, and judicial temperament

- No pressure may be placed on the military judge or court members to arrive at a particular decision

    - No person may invade the independent discretion of the military judge. Commanders may not question or seek explanation or justification for a judge's decision

- Witnesses may not be intimidated or discouraged from testifying

- The court decides punishment. An accused may not be punished before trial, but may be placed in pretrial confinement if there is a risk of flight, if the accused poses a serious threat to the community, or if the accused is likely to engage in further misconduct

Impartial Review. When a convening authority reviews the result of a court-martial and determines whether to approve the findings and sentence, he or she does so in a judicial capacity. As such, the convening authority has a duty to review impartially military justice actions. The convening authority may not have an inflexible attitude towards clemency.

TRIAL PROCEDURES IN THE MILITARY

The rules and procedures in courts-martial are very similar to those in civilian courts. The following discusses some of those similarities and points out some of the differences.

Pretrial Conferences ("Meeting in Chambers"). As in many civilian courts, a legally trained judge presides over most courts-martial. The "military judge" may hold informal conferences to coordinate aspects of the trial. These are similar to conferences a civilian judge might have "in chambers." Under the military rules, "RCM 802 conferences" may be in person, or by phone, but may not be used to resolve contested issues. Contested procedural or legal issues must be resolved in court, on the record.

Pretrial Hearings. The military judge usually settles contested legal or procedural issues under Article 39(a), of the Uniform Code of Military Justice, which allows him to conduct hearings for that purpose. Called "Article 39(a) sessions," the military judge may hear witnesses, take other evidence, and hear arguments, just as a civilian judge would during "motion hearings" in a civilian case. These sessions and most other proceedings of courts-martial are open to the public. As in civilian cases, Article 39(a) sessions take place outside the presence of the "court-martial members" who serve as the jury in military cases.

Arraignment. One of the first "Article 39(a) sessions" in a military case is typically "arraignment." Just as in civilian cases, the accused servicemember is informed of the charges against him and offered an opportunity to make a plea (i.e., "guilty" or "not guilty"). If the servicemember intends to plead guilty, before a formal plea may be accepted the military judge must ensure that the servicemember understands what he is doing and is acting voluntarily. This is called a "providency inquiry." Civilian judges have the same requirement, although the military inquiry is typically more extensive and fact-specific regarding the offenses.

The Court-Member Panel. Similar to civilian juries, court-martial members are officers or enlisted persons from the same community or command ("jury of peers") as the servicemember on trial. In civilian communities, serving on a jury is a duty of citizenship, and local court officials will "summon" citizens to serve as jurors. In the military, the commander assigns members to serve as jurors, and that becomes their primary military duty.

Voir Dire and Challenges. Just as with civilian jurors, court-martial members must be impartial and may make no decisions about a case until the military judge directs them to begin deliberations. Each side -- prosecution and defense -- gets a chance to ask the court-martial members questions to ensure that members are impartial. If a court-martial member's impartiality is brought into question, or if it is otherwise inappropriate for that member to serve on the court-martial, the military judge will dismiss him or her, as would a civilian judge. As is done in civilian courts, the prosecution or defense may also remove a court-martial member "peremptorily," meaning without a stated reason. In military practice, both the prosecution and defense are afforded one peremptory challenge. Also, like a civilian defendant, except in a capital case, a servicemember on trial may decide to have the judge decide his guilt or innocence, rather than court-martial members.

Trial on the Merits. Once the court-martial members are selected, the case is ready to proceed "on the merits," that is, evidence will be presented about the guilt or innocence of the servicemember. As with any civilian case, the military prosecutor (called a "trial counsel") presents evidence on the charges. The servicemember on trial (called "the accused") may confront this evidence and cross-examine any witnesses. The servicemember may also present evidence and, through the court-martial, compel witnesses to appear.

Rules Of Evidence. What evidence is admissible in a court-martial is spelled out in the Military Rules of Evidence (MRE). As required by the UCMJ, these rules are closely patterned after the Federal Rules of Evidence used in United States District Courts for civilian cases.

Defense Counsel. In all special and general court-martial cases, a military attorney, called a "defense counsel," represents the servicemember on trial. [Military attorneys are also known as "judge advocates."] This attorney is assigned free of charge to the servicemember. The servicemember may also request a specific military attorney to join his defense team and, if available, that attorney will also be assigned free of charge to the defense team. Finally, at his own expense, the servicemember may hire a civilian attorney (even so, the military attorneys remain assigned to the case).

Closing Arguments and Burden Of Proof. Mirroring the practice in civilian courts, once both prosecution and defense counsel have presented their evidence, they get to make "closing arguments." Following closing arguments, the military judge will instruct the court-martial members about the law and direct them to begin deliberations. Because all servicemembers are presumed to be innocent, the court-martial members must be satisfied that the evidence established the servicemember's guilt "beyond a reasonable doubt."

Deliberations and Voting. One departure from civilian cases arises in the way the court-martial members vote. Most civilian court systems require the jurors to vote unanimously to convict. Because of the need for expeditious resolution of cases, Congress directed that a vote of "two-thirds" of the court-martial members is needed before the accused may be found guilty of any offense charged. If the vote is less than a two-thirds to convict, a verdict of "not guilty" is required. As such, the military does not experience "hung juries," as do civilian jurisdictions. However, death penalty cases require a unanimous verdict. Voting is done by secret, written ballot. Although court-martial members are usually of different ranks, they are not permitted to use superiority of rank to influence or pressure another member.

Sentencing Proceeding. If the servicemember is convicted of any offense, the case proceeds immediately to the issue of sentencing. This is different from most civilian courts, where sentencing is delayed several weeks pending the completion of a presentencing report. In military cases, there is no presentencing report. Rather the prosecution and defense are expected to be prepared for this possibility and be ready to present evidence about the convicted servicemember and the offense.

Sentencing evidence includes the impact of the crime (both on a victim, and on a unit's discipline and morale), the servicemember's duty performance history, and extenuating or mitigating circumstances. Both the prosecution and defense may call witnesses. The accused

may also testify, give an unsworn statement for consideration. At the conclusion of the presentation of evidence, the prosecution and defense meet with the military judge regarding sentencing instructions to be given in court-member cases and then counsel present arguments about what the appropriate sentence should be.

If a servicemember elected to waive his right to have court-martial members participate in his case, then the military judge will impose the sentence. However, if court-martial members found the servicemember guilty, they will also decide the sentence. This is another difference from the typical practice in civilian courts where a judge imposes the sentence in almost all cases. The only exceptions in both civilian and military courts are death penalty cases that require the participation of a jury.

Once the prosecution and defense finish presenting all their evidence and arguments on sentencing, the military judge or court-martial members will deliberate on the appropriate penalty. The types of sentences that can be imposed differ significantly from those imposed in civilian cases. In civilian courts, typical sentences may include death, confinement, or fines. A civilian judge may also impose probation, and he may require the completion of community service and mandatory treatment or education programs as a condition of probation. Although probation is not possible in military cases because a court-martial is a temporary entity created to resolve a particular case and adjourned when the sentence is imposed, sentences may subsequently be suspended by the court-martial convening authority.

Military sentences can include many different punishments such as death, confinement, separation from the service, reduction in pay grade, forfeiture of pay and allowances, fine, and reprimand. The maximum limits on punishments for each offense are set by Congress in the Uniform Code of Military Justice and defined in more detail by the President in the Manual for Courts-Martial. Unlike civilian courts, where an individual will receive a sentence on each count for which he is convicted (for example, if convicted of two counts of burglary, a civilian judge might sentence an individual to three years in prison for each count to run consecutively -- or a total of six years in prison). In the military, a court-martial imposes one overall sentence, no matter how many "counts" (termed "specifications") there are. The overall sentence limits are the sum of the limits on each "count" charged. For example, a servicemember charged with burglary before a general court-martial would face a maximum possible sentence of 5 years of confinement, forfeiture of all pay and allowances and dishonorable discharge. If charged and convicted of <u>two</u> counts of burglary, the servicemember could be sentenced to up to 10 years of confinement. [It is not legally permissible in a single case to adjudge forfeitures all pay and allowances twice, or to receive two dishonorable discharges. Only the potential confinement for each convicted offense is accumulated.] Also, there are no "sentencing guidelines" or minimum sentence requirements for military courts.

When deliberating about a sentence, any court-martial member may propose a certain sentence. The court-martial members will then vote secretly on each proposal. Notably, a sentence of death must be unanimous; a sentence for life imprisonment or confinement for more than ten years jail requires agreement by three-fourths vote; and a sentence for anything less requires a two-thirds agreement by the court-martial members. Once the sentence is announced, the court-martial is adjourned and the post-trial review processes begin.

IMMUNITY AND PRETRIAL AGREEMENTS IN THE MILITARY

Immunity. Immunity for an individual is generally sought when that individual has information necessary to the public interest, including the needs of good order and discipline, but has refused or is likely to refuse to testify or provide the information on the basis of the privilege against self-incrimination. [5th Amendment to the U.S. Constitution or Article 31 of the Uniform Code of Military Justice (Section 831 of Title 10, United States Code).]

There are two types of immunity that may be granted under the military's justice system. The first type of immunity is "testimonial immunity." Testimonial immunity, also called "use" immunity, while still permitting a criminal prosecution, bars the use of a person's testimony and statements from being used directly or indirectly against that person in a subsequent court-martial. The prosecution must be based on evidence independent of the immunized testimony or statements. The second type of immunity is "transactional immunity." This type of immunity bars any subsequent court-martial action against the immunized person, regardless of the source of the evidence against that person. Testimonial or "use" immunity is generally preferred because it does not prevent the government from prosecuting the person based on independently-acquired evidence.

Only a General Court-Martial Convening Authority (GCMCA) may grant testimonial or transactional immunity. That authority, however, only extends to grants of immunity over individuals subject to the Uniform Code of Military Justice (UCMJ). The GCMCA can disapprove an immunity request for a witness not subject to the UCMJ, but may only approve the request after receiving authorization from the Department of Justice. If a witness may be considered for Federal prosecution or the case involves national security issues, then the Department of Justice must also authorize the immunity, regardless of whether the witness is subject or not subject to the Code.

A grant of immunity must be in writing, signed by the GCMCA, must include a statement of the authority under which it is made, and must identify the matters to which it extends.

The rules on immunity are contained at Rule for Courts-Martial (R.C.M.) 704, as supplemented by case law and service regulations.

Pretrial Agreements (PTAs). A Pretrial Agreement is a formal written agreement between the accused and the Court-Martial Convening Authority. It is commonly referred to as a "PTA." It usually involves a guilty plea by the accused in exchange for a sentence limitation. In other words, the accused agrees to plead guilty to some or all of the charges and specifications and the Convening Authority agrees not to approve an adjudged sentence in excess of a specified maximum.

Although not an exhaustive list, a convening authority may, as appropriate, promise: to refer the charges and specifications to a certain type of court-marital; to refer a capital offense as noncapital; to withdraw one or more charges or specifications from the court-martial; and to have trial counsel present no evidence as to one or more specifications. Likewise, the accused can

also make other promises that may cause the convening authority to favorably consider a PTA. These might include promising: to enter into a stipulation of fact concerning offenses to which a plea of guilty is entered; to testify as a witness in the trial of another person; to provide restitution to victims; or to waive certain procedural requirements.

Generally, pretrial agreements are not approved unless there is some convincing reason to forego trial on the facts and issues. For example, the case may have sensitive, sensational, or classified evidence or there is a desire to avoid the traumatic examination of a child witness. These agreements are also limited to cases where the available evidence of guilt is convincing and conviction is probable, assuming the case was to be tried.

The agreements can be initiated by the accused with the assistance of counsel or by the government. If the government initiates a PTA offer, the defense counsel assists the accused in negotiating and deciding upon an agreement. A military judge also has an affirmative duty to ensure a pretrial agreement does not improperly limit the accused's due process rights. The entire pretrial agreement must be in writing and signed by the accused, defense counsel, and the convening authority. The agreement must not involve any informal oral promises or representations. The agreement is normally prepared in two parts. The first part ordinarily contains an offer to plead guilty, a description of the offenses to which the offer extends, and a complete statement of any other agreed terms or conditions. The second part normally contains the convening authority's agreement on limiting the sentence. Either party may void an agreement by withdrawing from it. Withdrawals by either party must also be reduced to writing.

At trial, the military judge will conduct a full inquiry into the specific terms of the agreement to ensure the accused: fully understands both the meaning and effect of each provision of the agreement; voluntarily entered into the agreement; and received no oral promises in connection with the agreement. This inquiry is in addition to the judge's providence inquiry into the validity of the guilty plea itself without the accused's permission.

In a trial by military judge alone, the military judge will not examine the sentencing limitation of the agreement until after he or she has independently adjudged a sentence. In a trial by court members, the members are not informed of the existence of a pretrial agreement, nor is any statement made by an accused in connection with the agreement disclosed to the judge or the court-martial members.

If the adjudged sentence by the military judge or court-martial members exceeds the limit of the agreement, the convening authority may only approve the lesser, agreed-upon sentence. If the adjudged sentence is less than the agreed sentence limitation, then only the lesser, adjudged sentence may be approved. In other words, the military accused always receives the lesser of the adjudged sentence or the PTA sentence agreed upon.

The rules on pretrial agreements are contained at Rule for Courts-Martial (R.C.M.) 705, as supplemented by case law and service regulations.

POST-TRIAL REVIEW PROCEDURES

Record Of Trial and Authentication. After trial, a record of the trial proceedings is prepared by the court reporter. It is provided to both the trial counsel (prosecutor) and the defense counsel for correction, and is then authenticated (certified as accurate) by the military judge. The nature of adjudged sentence determines the type of record of trial that is required, verbatim or summarized. For a verbatim record of trial, the sentence must include one of the following punishments: dismissal, dishonorable discharge, bad-conduct discharge, confinement for more than six months, forfeiture of more than two-thirds pay per month or forfeitures for more than six months. Other records of trial are summarized. Although some very limited post-trial actions can be taken without the authenticated record of trial, the review process requires the completed record of trial.

Effective Date of Punishments. Any period of confinement included in the sentence of a court-martial begins to run from the date the sentence is adjudged unless deferred or suspended. Adjudged reductions in rank and adjudged forfeitures of pay and allowances are effective fourteen days after the sentence is adjudged or upon action of the convening authority, whichever is sooner. However, any sentence which includes confinement for more than six months or death, or confinement for six months or less and a dishonorable or bad-conduct discharge or dismissal results in a mandatory forfeiture of pay fourteen days after the sentence was adjudged, even if no forfeitures were adjudged. Under these requirements, a general court-martial results in total forfeiture of pay and allowances (allowances are separate payments for housing and food) during confinement, and a special court-martial results in forfeiture of two-thirds pay (but not allowances) during confinement. When the accused (defendant) has a family, the convening authority may waive the mandatory forfeitures for up to six months and re-direct pay and allowances for support of the accused's family. Other potential punishments (*e.g.*, fines, restriction to specified limits, hard labor without confinement) are effective when approved in the convening authority's action. Dismissals, dishonorable discharges and bad-conduct discharges must be approved by the convening authority, but cannot be ordered executed (issued) until appellate review is completed.

Deferment Requests. Upon written application of the defendant, the convening authority may defer adjudged confinement, forfeitures or reduction in rank. Deferment is a postponement of the beginning of the sentence. It is not a suspension of the sentence, and it is not a form of clemency. The accused has the burden of showing that his interest and the community's interests in deferment outweigh the community's interests in imposition of punishment. In making the decision, the convening authority may consider, among others, the following factors: the probability of flight; the probability of commission of other offenses; intimidation of witnesses; interference with the administration of justice; the nature of the offenses (including the effect on the victim); the sentence adjudged; the command's immediate need for the accused; the effect of deferment on good order and discipline in the command; and, the accused's character, mental condition, family situation, and service record. Deferments end when the convening authority takes action, when the punishment is suspended, when the deferment expires by its own terms, or by other rescission.

Staff Judge Advocate (SJA) Review and Defense Response. A formal legal recommendation is required to be prepared in all general courts-martial and in special courts-martial where a bad-conduct discharge is adjudged. An impartial Staff Judge Advocate signs the recommendation. That recommendation is served on the accused's attorney and the accused, who have ten days to submit comments. The ten-day period can be extended for an additional twenty days. These comments can address legal errors, provide facts supporting reversal of the findings of guilty or clemency. The accused and his or her attorney determine the scope of clemency matters. Clemency matters may include a repeat of matters presented at trial, other evidence of good character, post-trial statements from friends, or relatives, evidence of financial hardship, and evidence of the adjudged sentence's effect upon the accused's family. These comments, if any, along with the recommendation of the Staff Judge Advocate are forwarded to the convening authority for action.

Convening Authority Options and Action. The convening authority performs the initial step in the review process and has extensive discretion when taking action on a case. In taking action, the convening authority either approves the findings and sentence or may change either or both of them. He or she may dismiss any offense or change the finding of guilty of any offense to one of a lesser-included offense. The convening authority may disapprove the findings of guilty or all, or any part of, a legal sentence. However, court-martial findings of "not guilty" are final when adjudged and may not be later changed by the convening authority. He or she may reduce or suspend a sentence or change the punishment to one of a different nature so long as the severity of the punishment is not increased. The convening authority may approve a sentence only if he or she determines that it is warranted by the offense(s) and appropriate for the accused soldier. For example, the convening authority may reduce or eliminate any confinement, may change a dishonorable discharge to a bad-conduct discharge, and may reduce a sentence of death to imprisonment. Prior to taking action, the convening authority must consider the results of trial, the recommendation of the Staff Judge Advocate, and any matters submitted by the defense attorney and the accused. In general, the appellate process does not begin until the convening authority has taken action.

APPELLATE COURT REVIEW

Automatic Review and The Article 69 Process. If there is an approved sentence which includes a sentence of death, a punitive discharge (Dishonorable Discharge or Bad Conduct Discharge for enlisted personnel; Dismissal for officers), or confinement for one year or more, the Courts of Criminal Appeals of the accused's branch of service will automatically review the case. The accused can waive this automatic review in all cases, except death penalty cases. An accused who waives his appellate rights will still have his case reviewed, pursuant to Article 69 of the Uniform Code of Military Justice, by the service Judge Advocate General for legal errors and possible referral to the appellate courts.

Military Courts of Criminal Appeals

Review By the Court of Criminal Appeals. Each military service has established a Court of Criminal Appeals which is composed of one or more panels, and each panel has not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole. The court, sitting as a whole, may reconsider any decision of a panel. Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a licensed attorney. The Judge Advocate General of each Service designates one of the appellate military judges of that Service's Court of Criminal Appeals as chief judge. The chief judge assigns the appellate judges to the various court panels and determines which military judge will serve as the senior judge on each panel.

The Court of Criminal Appeals can correct any legal error it finds, and it can reduce what it considers to be an excessive sentence. Under Article 66©, UCMJ, the Court may only affirm findings of guilty and the sentence or such parts of the sentence that it finds correct in law and fact. In considering the record, the Court may weigh the evidence, judge the credibility of witnesses, and determine disputed questions of fact, recognizing that the trial court saw and heard the witnesses. Most civilian appellate courts can only consider issues of law, not questions of fact. They are bound by the findings of fact made by the civilian trial court. The power of the Court of Criminal Appeals to also consider questions of fact is a unique and important right afforded an accused under the UCMJ. Of course, similar to civilian appellate courts, the Court of Criminal Appeals cannot change a finding of "not guilty" to a finding of "guilty," nor can it increase the severity of the sentence approved by the court-martial convening authority.

Jurisdiction of the Courts of Criminal Appeals. Each Court of Criminal Appeals has jurisdiction to review courts-martial in which the sentence, as approved: extends to death; dismissal of a commissioned officer, cadet, or midshipman; dishonorable or bad-conduct discharge of enlisted personnel; or confinement for one year or more. These courts may also review cases referred to the Court by the Service's Judge Advocate General. In addition, the Courts may, in their discretion, entertain petitions for extraordinary relief including, but not limited to, writs of habeas corpus, mandamus, and prohibition. Except in a death penalty case, the right to appellate review may be waived by the accused.

United States Court of Appeals for the Armed Forces. Five civilian judges, appointed by the President and confirmed by Congress, comprise the Court of Appeals for the Armed Forces (CAAF) and serve for a term of 15 years. CAAF is responsible for overseeing the military justice system. In all but death penalty cases, which it reviews automatically, and cases certified by the Judge Advocate General, CAAF chooses upon petitions for review which cases it will consider, similar to Federal courts of appeal.

United States Supreme Court. Military members convicted of crimes may petition the U.S. Supreme Court for a review of their case. Decisions of the United States Court of Appeals for the Armed Forces are subject to review by the Supreme Court by writ of certiorari. However, the Supreme Court may not review a decision by the Court of Appeals for the Armed Forces which had refused to grant a petition for review. The military accused has a right, without cost, to the services of a military appellate defense counsel at all appellate review levels, including review by the Supreme Court. The military accused may petition the U. S. Supreme Court for a writ of certiorari without prepayment of fees and costs.

DEATH PENALTY CASES

Death is the authorized punishment for a number of very serious crimes. However, during peacetime the death penalty has only been sought and imposed in cases of felony-murder and premeditated murder. If the convening authority approves the sentence, there is a process of mandatory review of the facts, law and appropriateness of the sentence in terms of other similar cases. There is a right to petition the United States Supreme Court after the military appellate courts have reviewed a case. The President of the United States must approve all death sentences and signs the death warrant.

Capital Crimes. In order for a death penalty to be imposed the court-martial members (trial jurors) must reach a unanimous verdict that the servicemember is guilty of the crime. In the sentencing portion of a court-martial, in addition to the court-martial procedures required for other serious crimes, the members are required to make a unanimous finding that one or more specified aggravating factors exist and that they substantially outweigh any extenuating or mitigating circumstances. The military is what is called a "weighing jurisdiction." Throughout the review process, the accused is entitled to free military appellate defense counsel, in addition to retaining a civilian attorney at no expense to the government.

Review Process. A death sentence imposed by a court-martial must be approved by the convening authority and then reviewed by the appropriate Service Court of Criminal Appeals, and the U. S. Court of Appeals of the Armed Forces, prior to presidential review. The accused may also petition the U. S. Supreme Court for review. Assuming affirmation of the sentence at each stage of the review process, the Judge Advocate General (JAG) for a respective Service then forwards the case, with the JAG recommendation, to the Service Secretary. The Secretary cannot remit or suspend any part of a death sentence. The Service Secretary must forward the case to the President, usually with a recommendation by that Service Secretary. The President may request and consider input from the Attorney General, or any other executive branch department. The President then takes action approving, disapproving, or commuting the death sentence.

Habeas Corpus Petitions. After the President signs a death warrant, the accused can seek a writ of habeas corpus in the appropriate federal district court. The right of the accused to a military appellate defense counsel without cost extends to habeas corpus petitions filed in federal court, if requested by the accused.

Execution of Sentences. Only the President can order the execution of a death sentence. A sentence to death, which has been finally ordered executed, shall be carried out in the manner prescribed by the Service Secretary concerned. Currently, executions are by lethal injection.

CLEMENCY, PAROLE, PARDONS AND CORRECTION OF MILITARY RECORDS

Clemency. Clemency is an action by either the court-martial convening authority or a Clemency and Parole Board which may result in the mitigation, remission, or suspension of the whole or any part of an individual's court-martial sentence. To receive clemency from the convening authority, the accused may submit a request for clemency after the sentence is announced but before the convening authority takes final action. Pursuant to the Uniform Code of Military Justice, Service Secretaries may also grant clemency on unexecuted portions of a court-martial sentence. Primarily the Service's Clemency and Parole Boards exercise these clemency powers. Each board consists of five senior officers and provides recommendations and advice to the respective Service Secretary. Automatic clemency review is available to an accused depending on the length of confinement awarded and the branch of service. Clemency review can be waived.

Parole. Parole is the conditional release of an accused from confinement. The servicemember's Service regulations should be reviewed to determine eligibility criteria. The eligible applicant must submit a parole plan to the appropriate Service's Clemency and Parole Board. The parole plan must provide at a minimum a residence requirement, a requirement that the prisoner have either guaranteed employment, an offer of effective assistance to obtain employment, or acceptance in a bona fide educational or vocational program. Military prisoners transferred to the Federal Bureau of Prisons to serve their sentence are paroled at the discretion of the Federal Bureau of Prisons. The U. S. Probation office supervises all parolees.

In general, the Clemency and Parole Board looks at the following factors: the nature and circumstances of the crime; the military and civilian background of the offender; a substantial post-conviction educational or rehabilitative effort; post trial progress reports; recommendations of the military judge and legal officer; psychiatric evaluations; any statement by the victim; and, any restitution made to the victim.

Pardon. An individual may also petition for the highest form of clemency, a Presidential Pardon. Under Article II, Clause 1 of the Constitution, the President has the power to grant pardons for federal offenders. The pardon signifies forgiveness of an offense. However, a pardon will not change the nature of a discharge or expunge a record of conviction. Requests for pardons are handled through the Office of the Pardon Attorney, U. S. Department of Justice.

Correction of Military Records. Once an accused has exhausted all other possible remedies, another method for an accused to either modify or reduce a sentence may be by petition to the Board for the Correction of Military Records. Each Service has established a Board for the Correction of Service Records in order to correct military records, where such action is necessary or appropriate to correct an error or an injustice. These civilian boards are established pursuant to the statutory provisions of 10 U.S.C. § 1552. These boards cannot set aside a court-martial conviction, but may reduce or modify a sentence as a matter of clemency, even if the sentence has already been executed.

RELEASE OF INFORMATION

(The Freedom of Information and Privacy Acts)

The Freedom of Information Act. The Freedom of Information Act (FOIA) provides that any person has a right of access to federal agency records, except to the extent that such records are protected from disclosure by specific, enumerated exemptions.

Enacted in 1966, the FOIA established for the first time an effective right, based in statute (5 U.S.C. § 552), of access to government information. Principles of government openness and accountability underlie the FOIA. As stated by the Supreme Court:

> "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."

Society's strong interest in an open government can conflict with other important interests of the general public -- such as the public's interest in the effective and efficient operations of government; in the prudent governmental use of limited resources; and in the preservation of the confidentiality of sensitive personal, commercial, and governmental information. The FOIA attempts to balance these interests, and allows federal agencies to exempt from disclosure:

- National security information which is properly classified;
- Certain internal personnel rules, the disclosure of which would risk circumvention of a legal requirement;
- Matters specifically exempted by other statute;
- Trade secrets and confidential commercial or financial information obtained from other persons;
- Certain pre-decisional documents, or ones protected under attorney-client privilege or as attorney-client work product;
- Records which, if released, would constitute a clearly unwarranted invasion of personal privacy; and
- Certain records compiled for law enforcement purposes.

Federal agencies are required to publish rules of procedure to assist the public in making FOIA requests. Generally, a FOIA request must be in writing, cite to FOIA as authority for the request, reasonably describe the record sought, and indicate either a willingness to pay processing/duplication fees or an explanation as to why a fee waiver would be appropriate. FOIA requests should be sent to the agency or organization believed to be in possession of the

record. The FOIA provides federal agencies 20 working days in which to respond to requests, however due to the complexity of certain requests or a backlog of FOIA requests within certain agencies, final release determinations are sometimes delayed past this time period. Adverse release determinations may be appealed.

More detailed guidance on submitting FOIA requests to the Department of Defense or the military services can be found at:

Department of Defense: Title 32, Code of Federal Regulations, Parts 285, 286

Department of the Army: Title 32, Code of Federal Regulations, Part 518

Department of the Navy: Title 32, Code of Federal Regulations, Part 701

Department of the Air Force: Title 32, Code of Federal Regulations, Part 806

Most federal agencies now maintain FOIA information on public web sites (for DoD and the military services, see www.defenselink.mil).

The Privacy Act. The Privacy Act (PA) of 1974 (5 U.S.C. §552a) regulates the collection, maintenance, use, and dissemination of personal information held by federal agencies.

The purpose of the PA is to **balance**:

Government's bona fide need to maintain certain personal information about individuals	**versus**	The rights of individuals to be protected against unwarranted invasions of privacy

The PA focuses on **4 basic objectives**:

1. To establish a code of "**fair information practices**." The PA requires that federal agencies only maintain such information about an individual as is relevant and necessary to accomplish an authorized agency purpose. Each individual who is asked to provide personal information must, in writing, be informed of:

    - The legal authority the agency relies upon in requesting personal information;
    - The principal purpose for which the information is intended to be used;
    - The routine uses which may be made of such information; and
    - Whether providing information is mandatory or voluntary and the effects, if any, of not providing the information requested.

2. To grant individuals the **right to access** to agency records maintained on themselves. If an agency maintains a "system of records" in which personal information is maintained and accessible through use of a personal identifier (e.g., name or social security number), notice of the system must be published in the Federal Register. In this notice, agencies describe the categories of individuals who may have personal information contained therein, the types of records that may be present, as well as the purpose and routine uses of system files. Notices also contain procedures on how individuals request copies of, or access to, any files about themselves. Certain exemptions may apply (e.g., law enforcement records may not be accessible). In addition to periodic publication in the Federal Register, the National Archives and Records Administration (NARA) maintains a compilation of agency PA issuance at www.nara.gov.

3. To grant individuals the **right to seek amendment** of agency records maintained on themselves. If an individual believes that information is not accurate, relevant, timely, or complete, he/she may request amendment of his/her own record. The agency must either make any requested correction or inform the individual of its refusal and procedures for appeal.

4. To **restrict disclosures of personal information to third parties**. Generally, federal agencies may not release personal information contained or originating from its records to anyone besides the individual to whom the record relates, unless that individual provides prior written consent. The PA does allow certain nonconsensual disclosures to third parties in limited circumstances, including:

    - Intra-agency disclosures to employees who have a "need to know";
    - Where required by the Freedom of Information Act (and only after an appropriate balancing of the individual's privacy interest vs. public interest);
    - Disclosures made in accordance with published "routine uses" of the record;
    - In response to proper law enforcement requests;
    - In compelling circumstances to protect the health and safety of an individual;
    - To Congress, Bureau of Census, National Archives, or GAO; and
    - In response to a court order.

The PA requires agencies to maintain an accurate accounting for each of the above disclosures (except intra-agency releases), a copy of which may be requested by the individual to whom the record relates.

RELEASE OF INFORMATION

(Military Justice and Disciplinary Actions)

Congressional Inquiries. When a Member of Congress requests information related to a disciplinary case and such information may be protected by the Privacy Act (PA), the releasing authority must first determine the capacity in which the Member is requesting the information. If a Member of Congress is requesting information on behalf of either House, or a committee or subcommittee thereof, regarding a matter within its jurisdiction, then a statutory PA exception permits release of the information. DOD regulations govern the procedures for releasing information related to the official action of Congress.

If a Member of Congress requests information in a personal capacity or on behalf of a constituent, the statutory exception does not apply. The request for information must be treated in the same manner as a request from any other individual. If the information involves the privacy interest of the individual for whom the Member of Congress is making the request and such individual has provided the Member with written authorization and consent to release, then the information may be provided. However, other Freedom of Information Act (FOIA) exceptions to disclosure, such as the exception related to information collected for law enforcement purposes, may limit disclosure. If the information is requested personally by the Member of Congress or on behalf of a person other than the individual with the privacy interest (e.g. crime victim), then PA requirements must be balanced against FOIA concerns. If release of the information is not required by FOIA and such release will be an unwarranted invasion of privacy, then the information may not be released. Likewise, if a FOIA exception to disclosure applies, then disclosure will be limited. Service regulations provide procedures for responding to requests from Members of Congress that are personal or on behalf of a constituent.

Court-Martial, Nonjudicial Punishment, and Administrative Actions:

General. Release of information related to adverse personnel actions involves considerations of the relationship between the Freedom of Information Act (FOIA) and the Privacy Act (PA). Where the action is not final, the primary consideration must be the fairness of the proceedings. If the release of information may affect the impartiality of an adjudicator or reviewing authority, then such release should not occur. Where the action is final and privacy interests are involved, FOIA and PA concerns must be reconciled. If the FOIA requires disclosure of the information and such disclosure does not constitute a clearly unwarranted invasion of personal privacy, the PA does not bar disclosure. Thus, under certain circumstances, FOIA provides an exception to the general rule that an individual's consent is required to disclose PA protected information. Finally, FOIA exceptions to disclosure, such as the limitation on providing information collected for law enforcement purposes, may apply.

Court-Martial. Court-martial proceedings are generally open to the public and media. Thus, information concerning action taken in open court, the results of court proceedings, and subsequent actions, such as clemency and appellate review, are not generally protected by the PA. Accordingly, such information may usually be released. Additionally, a written FOIA request is not needed prior to release of such information. However, despite the public availability of court-martial information, a privacy interest may exist with respect to material that is "practically obscure." Such an interest may exist with respect to court-martial records from proceedings that occurred in the relatively distant past. Thus, information related to recent cases may be readily releasable, while information related to older cases may require detailed review in order to determine whether it may be released.

Nonjudicial Punishment. Unlike courts-martial, the imposition of nonjudicial punishment (NJP) and the hearings thereon are not open to the public. Accordingly, release of information concerning NJP is restricted. Under NJP procedures, the alleged offender may request that his or her personal hearing before the commander be “open to the public.” Generally, this means to members of the command. For good cause, commanders may also open personal hearings to members of the command. When the NJP proceedings are open to members of the command imposing NJP, the results, including personal identifying information may be released to members of the command. The justification for this is under both the "routine use" exception and the concept that no "disclosure" occurs where the information is already available to those to whom it is provided.

If NJP results are to be disclosed outside of the command, then FOIA and PA concerns must be reconciled. In most cases, the privacy interest of the individual will outweigh the FOIA interest of informing the public about the functioning of its government. In such cases, NJP information should not be released. On the other hand, the circumstances of some cases may create a greater need to inform the public. Specifically, where the misconduct for which NJP was imposed involves a government official's violation of the public trust, disclosure can be justified by the need to inform the public and instill confidence in government operations and also by the benefit and deterrent effect that would result from public dissemination. The balance in favor of disclosure is even higher when the misconduct involves high-ranking government officials.

Administrative Action. Adverse administrative actions, such as administrative separation or non-punitive censure, are not matters of public record. In most cases, disclosure of the character of separation or other administrative action will be an unwarranted invasion of privacy and the balance will weigh against disclosure. On the other hand, as with NJP results, the circumstances of a given case may involve FOIA considerations that favor disclosure.

DISCHARGES, RESIGNATIONS, AND RETIREMENTS IN LIEU OF COURT-MARTIAL

General. Separation of an accused in lieu of trial by court-martial is an administrative procedure that is available to resolve disciplinary matters and may be used in appropriate cases. Whether such administrative action is appropriate in a given case is a matter within the discretion of the approval authority. DOD and service regulations detail the procedures and requirements for such action. Generally, an accused initiates the request and, if approved, the accused is separated from military service. In exchange for such voluntary separation, the charges against the accused are dismissed. No regulation specifically authorizes retirement in lieu of court-martial; however, no regulation prohibits such action. A retirement-eligible servicemember may not be administratively discharged without the member's consent. In other words, only a punitive discharge, awarded at court-martial, will divest retirement. Thus, in a given case, it may be appropriate to retire an individual instead of trying that person at court-martial. Additionally, an officer may be retired at a grade lower than the highest grade in which the officer served. While separation in lieu of court-martial is administrative in nature, the existence of such a procedure is recognized in the Military Rules of Evidence. Specifically, statements made in the course of a request for separation in lieu of court-martial, including admissions or acknowledgments of guilt, are not generally admissible in a court-martial.

Procedure and Approval Authority for Enlisted Personnel. DOD regulations provide the details regarding the procedure for the separation of enlisted personnel in lieu of court-martial. In addition, Service policies and procedures apply. There are three requirements that must be met when and accused requests discharge in lieu of court-martial. First, charges must be preferred against the accused. Second, the authorized maximum punishment for the offense, upon which separation is to be based, must include a punitive discharge. The Manual for Courts-Martial identifies those offenses that may be punished by a punitive discharge. Finally, there must be an assessment made that the accused is unqualified for future military service. This determination may be based on the seriousness of the charged offense(s) and the related circumstances, as well as other factors related to the service of the accused.

A request for discharge in lieu of trial by court-martial must also meet several requirements. Specifically, the request must be in writing and signed by the accused. The accused must be afforded the opportunity to consult with legal counsel and if legal counsel is sought, counsel must sign the request. Additionally, in the request the accused must state that he or she understands the elements of the charged offense and the consequences of administrative separation. This understanding must also acknowledge the possibility of an adverse characterization of service. The discharge case file must also contain either an acknowledgement that the accused is guilty of an offense for which a punitive discharge is authorized or a summary of the evidence supporting the guilt of the accused. Statements made by the accused or defense counsel in connection with the discharge request are not admissible against the accused in a court-martial should the discharge request be disapproved.

In most cases, the approval authority for discharge in lieu of court-martial is the appropriate General Court-Martial Convening Authority. The sole exception to this is that a

Special Court-Martial Convening Authority may approve separations that are based only on the offense of unauthorized absence of greater than 30 days.

Procedure and Approval Authority for Officers. Service regulations provide the details regarding the procedure for separation of officers in lieu of court-martial. Generally, the request procedures are similar to those relating to enlisted personnel. The primary difference is that the Secretary of the applicable service is the approval authority. The reason for this is that such requests are really requests by the officer to resign his or her commission. Officer commissions are held at the pleasure of the President, who has delegated resignation approval authority to Service Secretaries.

Types of Discharges. Normally, requests for administrative discharge in lieu of trial by court-martial are characterized as discharges Under Other Than Honorable Conditions (UOTHC). There are three types of administrative discharge characterizations: Under Other Than Honorable Conditions (UOTHC), General (under Honorable Conditions), and Honorable. The serious nature of the misconduct and the circumstances warranting trial by court-martial generally support the appropriateness of a UOTHC discharge. Characterization of service as General (under honorable conditions) is authorized only where appropriate. A General discharge may be appropriate, for example, if the offense is relatively minor or if the service of the individual is otherwise particularly meritorious. An Honorable discharge is only authorized if the individual's record of service is so meritorious that any other characterization would be inappropriate.

ANNEX B

PRACTICAL POINTERS

FOR

COAST GUARD MEDIA PLANS

ANNEX B

Practical Pointers for Coast Guard Media Plans

Be Involved With Plan Development

Remember, dealing with the media is PA's mission and hence PA is responsible for the media plan. However, just as no op plan is developed without the active input of those experts who must employ it, no PA plan should be developed without ACTIVE legal counsel involvement. As soon as a case is identified as "high-profile," a specially trained legal spokesperson will be detailed to the case from outside the Staff Judge Advocate's office by G-LMJ, MLCA(l), MLCP(l), or CCGD 13(d1) to assist in responding to the media. The legal spokesperson should help develop the plan, review it, and provide the substantive legal information needed to develop the plan. The commander should approve it. The plan should generally address the following:

- **Themes and messages** that should be made by PA in its releases to the media. These themes should be clear, short and to-the-point. (For example, "We are concerned with unprofessional relationships because they pose a risk to unit morale and discipline." Or, "Coast Guard justice is gender neutral.")

- **Written Q's and A's** (questions and answers) prepared for PA's use in responding to standard and expected media questions.

Establish a Media Center

Establish a media center consisting of local PAs and a legal spokesperson from G-LMJ, MLCA(l) or MLCP(l), with a "media center director" from PA, and with adequate phone lines and basic amenities such as coffee, water, etc., at a location convenient to the courtroom. Ensure, though, that the media center is located in an area that will not unduly interfere with trial proceedings or, more importantly, deliberations. As news reporters arrive at media center (consider having PA rep at gate to direct them to media center), provide handouts, brief them on rules, location of restrooms, etc. Provide lots of space/phones/outlets to file stories, plug in laptop computers, etc. Don't forget cameramen camped outside.

Escorting the Media

Provide the media with badges so they can be distinguished from other civilians in the area. Some will attempt to wander off and may enter off-limits areas such as the deliberation room, and may try to interview bystanders without an escort. You must HAVE PLENTY OF ESCORTS for the media to avoid problems. (Consider allowing media to have an area where they can wander about at will, with the understanding they will comply with your other rules on interviews, photography, etc.; otherwise, you will need a one-for-one escort, which may not be practical or feasible.)

Media in the Courtroom

Reserve a reasonable number of courtroom seats for the media and at least one PA escort. If the number of reporters wishing to cover the trail exceeds the number of seats that can reasonably be allocated, consider pool coverage. In extraordinary situations, it may also be appropriate to ask the judge pursuant to RCM 806 (C) to allow contemporaneous closed-circuit video or audio transmission to permit viewing or hearing by spectators in a separate room when courtroom facilities are inadequate to accommodate a reasonable number of spectators.

Prepare Your Spokesperson

Prepare the assigned legal spokesperson to deal with the media. While PA is responsible for organizing and assuring execution of the plan, commanders and legal officers are most likely to be called upon to be spokespersons on military procedures, justice and command issues. People who actually work with the justice system on a daily basis frequently have more inherent credibility than someone who has had a "crash course" in the basics of military justice. Judge advocates should be used as spokespersons to explain the Uniform Code of Military Justice issues surrounding the case. Unless requested, they are, ordinarily, not to be considered spokespersons on command issues more appropriately addressed by those who have responsibility of command. Media training for the spokespeople is essential.

Pre-trial Background Briefing

Prepare a pre-trial background briefing, with written handouts, for the media – preferably moderated by PA but conducted by the legal spokesperson – on military justice procedures. Such a briefing should focus on the process, and steer away from substantive issues in the case, especially evidentiary issues related to guilt or innocence. The briefing can also include the kinds of releasable information discussed

earlier in this document. It should also educate the media about how the UCMJ favorably compares to the civilian system.

Press Kits

Prepare a press information kit, and ask your legal office to review the contents to verify that release will not create legal issues. Then, distribute a kit to credentialed media covering the trial and/or attending the pre-trial background briefing. Include only those items that are of importance to the media, and have more general information available for them to pick up. Among items you may wish to include in such a kit may be:

- "Ground rules" for press members (e.g., where they are allowed to go on base, where photography is permitted or prohibited, procedures for requesting interviews, including locations of "man on the street" interviews, whether they will be allowed back into the courtroom after the day's proceedings in order to do a "standup," etc.). Be sure everyone understands your conditions in advance.
- Copy of the charges, sanitized as appropriate. (No social security numbers or other Privacy Act protected information.)
- Provide Fact Sheet explanation of UCMJ process from *Annex A* as appropriate.
- Extracts of the UCMJ and MCM as appropriate.
- List of names of trial participants (not including, though, witnesses, or judge or members).
- Information on how to contact PA after duty hours.

Continuous Media Oversight

Once trial begins, continued oversight by both PA and the legal spokesperson is critical. Periodic procedural updates through the use of "background" interviews can be effective in keeping the media informed about the progress of the trial. (Be aware of and follow any "gag" order issued by the judge, though. On average, "gag orders" should not be encouraged by the government.)